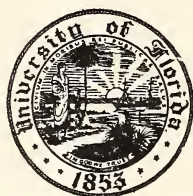


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LITERARY PROPERTY
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By

RALPH R. SHAW, PH.D.

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To
V. S. S.

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PREFACE

Literary property is a confused and controversial field. It is of concern not only to authors, to publishers and to copyright lawyers, but to the scholarly public as well. At meetings of librarians, scientists, humanists, and other users of recorded knowledge, in fact, wherever communication of any kind is discussed, questions about literary property soon come to the fore. When these questions do arise, confusion and frustration almost inevitably follow.

This book attempts to determine from the primary sources — the American court records — just what literary property is; what it is intended to protect; why; how; and for whom; the extent to which these goals have been achieved; and what, if anything, may be done about it. It should be noted that there are considerable differences between the philosophy underlying literary property in America and that of other countries, and that the problems involved in international copyright are not treated in this book.

Scores of people contributed to the preparation of this work, and some two score read the manuscript in its various stages. Comment from readers indicated, even more clearly than before, the necessity for keeping any discussion of literary property as close to the record as possible. For example, one reader, long associated with a university press, was surprised to read that copyright is obtained merely by publishing with the proper notice, and had difficulty in giving credence to that fact even though the Supreme Court was cited as authority. Two readers, one a publisher and the other a lawyer, mistook the suggestion that an objective standard for fair use be substituted for subjective standards as a suggestion that "fair use" be permitted, and notwithstanding the bulk of citations showing that the concept of "fair use" has long been recognized, objected to what they considered was creation of that doctrine in this book on the grounds that (a) it would permit violation of the rights of authors, and (b) that the amount suggested as the objective measure of fair use is too small to bother about. Still another reader, a publisher, agreeing that the cases cited lead to the conclusion given, nevertheless argued that trade practice differs from the court decisions and that the practice of the trade should be determinative. Arguments such as these may be multiplied indefinitely. They do indicate clearly that whatever value this book may have rests upon

the adequacy with which the official interpretations have been uncovered and applied; and that all conclusions must be judged on the basis of the court records which are cited as authority. Since unanimity of court opinion is found in only a few areas—in others the decisions vary or even contradict each other, and in many areas the questions have not been considered by the courts — the most that can be claimed for this book is that it attempts to identify all significant problems, stating the extent to which the courts have interpreted each, and indicating possible solutions.

While it is not feasible to enumerate all those who gave of their time and experience, the author wishes to acknowledge the help of Dr. H. M. Lydenberg, Mr. Verner W. Clapp, Dr. Luther H. Evans, and Dr. Werner B. Ellinger. This book was prepared originally as a doctoral dissertation at the University of Chicago, and the author owes a special debt of gratitude to Dr. Jesse H. Shera and Dr. Douglas Waples of the Graduate Library School as well as to Dean Edward H. Levi of the Law School of the University of Chicago.

RALPH R. SHAW

Table of Contents

Chapter	Page
PREFACE	IV

PART I

I. INTRODUCTION	7
II. WHAT IS LITERARY PROPERTY?	12
What Does Literary Property Protect?	13
III. PHILOSOPHICAL BASES OF LITERARY PROPERTY	15
Right to Privacy	16
Right to Profit	18
Moral Right	20
Right to Credit	23
IV. COMMON LAW LITERARY PROPERTY	26
V. WHAT IS COPYRIGHT?	29
Differences between Common Law Rights and Copyright	30
What Is Copyright Intended to Achieve?	32
VI. LEGAL BASIS OF COPYRIGHT	43
VII. WHAT DOES COPYRIGHT PROTECT?	51
VIII. WHO MAY OBTAIN COPYRIGHT?	56
IX. HOW IS COPYRIGHT OBTAINED?	61
X. FAIR USE	67
XI. OTHER RIGHTS OF USERS	72
XII. WHAT ARE "WRITINGS" OF "AUTHORS"? ..	77
XIII. PUBLIC DOMAIN	83
XIV. WHAT IS PUBLICATION?	86
General Publication	87
Restricted Publication	90
XV. WHEN IS COPYING "COPYING"?	96
XVI. INFRINGEMENT	101

XVII. COMMON SENSE ABOUT LITERARY	
PROPERTY	104
The Scholar as Author	104
Right to privacy	105
How long should privacy be protected?	106
Right to make first public use	108
Right to dedicate	113
Right to credit	116
Moral right	116
Right to profit	117
Author or Publisher	120
The Scholar as User of Literary Property	129
Right to make private use	133
Right to make public use	134
XVIII. LITERARY PROPERTY AND SCHOLARLY	
INSTITUTIONS	136
Manuscripts	136
Theses	143
Recompiling	145
Replacement of Pages	146
Copying Services	147
XIX. CONCLUSIONS	157
Nature of Literary Property	158
Objects of Protection of Literary Property	162
Interpretation of the Copyright Act	165

PART II

CITATIONS	173
INDEX	268

Part I

CHAPTER I

Introduction

Copyright was characterized by one jurist as the "metaphysics of law." Certainly there are great difficulties in determining what the law is: individuals differ on many points; lawyers disagree; the courts appear at times to contradict each other and, in some cases at least, to disregard dicta previously laid down by higher courts. There are many points of interpretation of the intent and application both of common law rights and statute, points of vital interest to scholars, on which the law appears neither to be laid down in the words of statute nor to have been interpreted by the courts.

The interpretation of court decisions is always a parlous undertaking—even for lawyers. Each decision is laid against a background all its own, and the words of the decision must be interpreted in the light of the mosaic against which it is set. That is why lawyers so frequently disagree on the meaning of a decision, and that is why it is essential to have higher courts to review and interpret the opinions of the courts.

When there is no disagreement, no suit results, and the courts, therefore, study only those cases in which the meaning of the law is in dispute. Points which have not been decided by the courts are either those on which there is general agreement or are those which have never been brought to issue.

In the field of literary property or copyright, the latter is very frequently the case, and many points on which there is controversy appear never to have been considered by the courts. To some extent, the cases appear to have been tried, on all levels, on the pleadings rather than on their merits—and where all pertinent questions are not included in the brief, it appears that important cases have been decided on fairly trivial side-issues.

In this respect, note, for example, the case of *Washingtonian v. Pearson* (187),¹ which was prosecuted through the Supreme Court. The owner of the *Washingtonian* magazine—which went out of business without paying the author the sum promised for his article—

¹The numbers in parenthesis refer to cases cited in Part II.

sued Pearson and others, who bought the article from the author and paid him for it. Yet the Supreme Court appears to have considered only the question of whether the deposit in the Copyright Office must be made within a "reasonable" length of time after publication and on that basis held that Pearson had to pay the owner of the defunct magazine a large sum of money.

And, as stated by the Ninth Circuit Court of Appeals in *Corcoran v. Montgomery Ward* (53), "Whatever may superficially appear to be the justice of the appellant's claim, it is to be remembered that his case is governed entirely by the statute."

It is necessary, therefore, to warn the reader that this is *not* a lawbook. It contains nothing on pleadings. It will not tell anyone how to win a copyright suit. Rather, it is an attempt to summarize all statements by the courts (whether in the opinion or in the explanation of the reasoning that led to the opinion) which bear in any way on the interests of scholars and of scholarly institutions in relation to literary property or copyright. In a few cases in which the briefs raised questions of importance to scholars which were not specifically decided by the Court, the briefs are quoted. Emphasis in selection of citations has been placed upon the principles involved rather than on the relative authority of the source. This book cannot, therefore, be used to provide the basis of arguments in copyright suits.

Since the point of view stressed in this study is that of the scholar, cases on motion picture rights, radio rights, music and similar litigation in which the interest is primarily financial, are cited only insofar as they indicate principles of interest to scholars.

In order to aid those who wish to evaluate the quotations in terms of the relative authority generally attributed to the dicta of the various courts, the court involved is generally identified specifically in the citation if it is other than a Federal District Court. In general, in copyright cases, the Second Circuit Court of Appeals has been considered the most authoritative source below the United States Supreme Court because it has tried many more cases in this field than have the others. In common law cases, which are not ordinarily tried in Federal Courts, except where there is a diversity of citizenship, the Appellate Division of the New York State Supreme Court appears to have had more experience than others.

However, as will appear in the text, even Supreme Court decisions do not appear always to have been considered adequately in

subsequent decisions by other courts, so that the question of relative authority, important as that may be to lawyers and to the Courts, is of secondary importance in this book. Relatively few copyright cases are appealed to the Circuit Court of Appeals, and even fewer reach the Supreme Court. Thus, interpretation of copyright as it normally affects scholars is interpretation at the level of the District Court. It is all very well to say that the disagreeing decisions may be wrong, and that successive appeals to higher courts in all such cases would correct such allegedly erroneous decisions, yet, in fact, in the preponderance of cases in copyright, appeals have not occurred and the findings of the District Courts have been the law insofar as the contestants have been concerned.

American practice was derived from the English common law and statute, and English cases have frequently been cited as precedent in American courts. There are, however, wide divergencies in philosophy and interpretation of the literary property rights and copyright between the United States practice and that of foreign countries. The cases cited in this volume are American cases, with special emphasis on interpretations since the passage of the Act of 1909, which is substantially the present American Copyright statute. Foreign cases are noted only when they have been cited as authority by American courts.

The purpose of this book is not to decide cases at law. Rather it attempts to discover the philosophy underlying both the common law literary property right and copyright, and to determine what they are all about — whom they are intended to protect and how, the extent to which they achieve their goals, and, if possible, to determine what the rights should attempt to protect and how that might best be achieved.

At present the scholar is both helped and hindered by literary property rights. The protection they afford him is important but, in many respects, inadequate; the hindrance they may offer to the economical use of his limited time and energy may seriously hamper the advancement of knowledge. And the uncertainties with which he is faced in using any writings (which may or may not be protected by law, whether printed or not) leaves him in the position of the traveler who must cross a swamp on a moonless night with no guide — a special swamp which has signs posted saying both "All welcome" and "No trespassing." He has no way of determining what consti-

tutes trespass until after he has done it and a court has ruled on it, yet he must get across the swamp if he is to make any progress. Furthermore, the swamp is full of quagmires.

Fortunately for the poor scholar the quagmires have been covered by a thin crust of ice, just about thick enough to bear his weight — if he move quickly and lightly. But, unfortunately for his peace of mind, he can never tell when the ice will give.

Thus, the scholar is easy prey to the many threats of disaster. In the course of just a few months the following examples of confusion as to the rights conveyed by copyright, or the duration of copyright, were encountered:

1. A statement by a copyright lawyer that copying of even a single word from a copyrighted publication may be infringement of the copyright.

2. A demand from the owner of a copy of a magazine printed and published more than one hundred years ago, who may or may not have been the owner of the copyright when it existed, that anyone who wished to obtain or make a copy of any part of the magazine obtain his permission in advance.

3. An allegation that the publisher of a scientific abstracting journal violates copyright if he publishes abstracts of articles without first obtaining permission of the copyright owners.

4. That the user of a copyrighted work may not take notes for his own use.

5. A statement in a journal published in this country without notice of copyright that any copying without permission would be penalized to the limits of the copyright law.

6. A journal published in this country without copyright notice which states, "no more than 50 percent of any article in this journal may be reprinted without permission."

7. A book consisting primarily of a review of the literature, averaging almost three citations per page from other scholarly works, and including tables reproduced from Government reports which cannot be protected by copyright, which states that any copying, including microfilm or photostat copying, of any part of the work will be prosecuted.

These examples may be multiplied many fold. Moreover, lacking a clear statement as to the nature, scope, objectives and application of both common law rights and statutory copyright, the scholar may

fail to receive the protection of his own works which the law is intended to provide.

The heights to which confusion may rise in this field of literary property are indicated by the fact that, while publication without notice dedicates the work so published to the public, a book which is printed and bound, and which bears no notice of copyright, may, in fact, never have been "published" and may, therefore, be protected by the common law! Thus, lack of notice alone is no guarantee that the book is in the public domain; and, since deposit is not required to ensure copyright, failure of the records of the Copyright Office to show registration is not a guarantee that a printed book, which is not registered and which bears no notice of copyright, is not protected as literary property.

On the other hand, a book bearing the copyright notice in the name of a publisher may, under the theory of "beneficial interest," actually be the literary property of the author — whose name need not even appear in the book — and the publisher who is the legal owner of the copyright may be an infringer of the copyright which he legally owns.

The purposes of this book, therefore, are:

1. To clarify the objectives and scope of copyright and of common law rights;
2. To define and describe the apparent present state of common law literary property and of statutory copyright insofar as they appear to affect the interests of scholars and of scholarly institutions;
3. To isolate and describe those aspects of copyright and of literary property rights which affect the advancement of learning, but which do not appear to be recognized by our present laws or court decisions; and
4. To indicate areas in which both statutory copyright and common law literary property appear to require restudying if they are to achieve the objects for which they were evolved.

CHAPTER II

What Is Literary Property?

Mr. Justice Holmes said in relation to copyright (269),

The notion of property starts I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.

This statement, adequate as it is with respect to *copyright*, highlights the fact that statutory copyright is but one form of literary property. The common law right, which is the other form, is not a product of statute, may endure indefinitely, and while an object *in vacuo*, just as is copyright, may achieve for indefinite periods practically all the things which Mr. Justice Holmes says could not be tolerated or endured for such periods.

There are two generally recognized types of literary property. Both are frequently referred to as "copyright." They are related and it is very difficult to discuss either of them separately. Nevertheless, they are entirely different, and recognition of their distinct character should remove much of the confusion which surrounds any discussion of literary property.

The form of literary property which is covered only by the common law — which will be referred to in this book as "common law literary property" — is the right to control the public use of a manuscript up to the moment when it is first generally published.

The second type of literary property is entirely statutory in nature and is the right to monopoly after the first general publication.

This, and only this type of property right, will be referred to in this volume as "copyright."

Literary property is an intangible, incorporeal right, in the nature of a privilege or franchise and is independent of any material substance, such as the manuscript or the plate used for printing (110).

What Does Literary Property Protect?

Literary property, whether common law or statutory, is concerned only with a form of presentation — it never monopolizes the ideas or facts contained either in a manuscript or in a publication (16, 21, 95, 160, 206, 208, 211, 216, 226, 239). Facts as such are public property (100). Obviously, if an author could, by originating a new arrangement and form of expression of certain ideas or conceptions, withdraw those ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted (72, 100).

Just as a patent affords protection only to the means of reducing an inventive idea to practice, so the copyright law protects the means of expressing an idea. If the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist (69). The very purpose of publishing a book on science or the useful arts is to communicate to the world the useful knowledge it contains, and free public use of the ideas and facts is the end which is intended (55).

Copyright protects the *expression* of the idea. It does not protect the idea (36, 171); and, if the expression of the idea does not take concrete form at the time of disclosure, it is not the subject of a property right or of contract (171).

The key to understanding of literary property is the fact that the only thing which is protected, as any literary property, is a particular form of presentation. And even that is not protected in the same degree that patents protect inventions. To obtain a patent, an inventor must show sufficient novelty in execution of the method or mechanism which he wishes to protect to support a claim of originality. Once his patent is granted, anyone else who hits upon the same idea and the same or a similar method of carrying out that idea

will be stopped, during the life of the prior patent, from making or using or selling his invention.

None of this is true with respect to literary property. Literary property rights are granted without examination for novelty. They do not apply to "use" of any physical object, nor do they prevent a later author from writing and obtaining protection for a similar, or even an identical, work.

The only thing interdicted by literary property is "copying," and the term "copying" is, as will be noted below, used in a special legal sense.

If two different authors should happen to write substantially identical books, each may secure protection for his creative work, provided only that neither can be shown to have had access to or, in fact, to have copied from the work of the other. Each would thus gain the right to prevent others from "copying" his work, but he would not be able to prevent others from creating a similar work.

CHAPTER III

Philosophical Bases of Literary Property

The fundamental assumption upon which the common law right of literary property is based is that the very act of creating a work of "authorship" creates an intangible form of property. Definition of the nature of that property and of the rights which society should recognize adequately to protect that property is difficult because of the many different forms in which literary property is manifested, and because of the different kind of protection needed to ensure adequate protection for each type of material or form of presentation. It is even possible, as noted below, that what will protect an author's interests in one respect may defeat his purposes in another.

The fundamental assumption upon which copyright is based is not, however, that the act of creation automatically creates a property right. Copyright is not a "right" at all in the United States. Rather it is a purely statutory grant. It is in the nature of a franchise granted in return for performance by the author of certain acts specified in the statute. This concept of the control of the multiplication and sale of copies after first general publication as a limited statutory franchise rather than as a "right" is probably the greatest stumbling block in the way of American participation in an international copyright convention. In many foreign countries the copyright is considered a right resulting from the act of creation; in the United States the act of writing creates the common law literary property only, and that property endures only until the moment of first general publication. After first general publication, in this country, we recognize that an author may, and frequently does, wish to dedicate his work to the public. In many foreign countries this right to dedicate is not recognized, since everything is automatically copyrighted.

The concepts which have been most influential in shaping our modern philosophy of literary property appear to be: (a) the right to privacy, (b) the right to share in any profits resulting from one's labors, (c) moral rights, and (d) the right to public recognition.

Right to Privacy

The philosophy of a right to privacy is the basis for much of the common law literary property right. It appears to be the only philosophy which reasonably justifies protection of the right of the writer of a personal letter to control its dissemination after it has left his hands.

Few letters have any market value whatever, and even fewer have any value as merchandise during the lifetime of their authors. Furthermore, the recipient of the letter is recognized as the proprietor of the material of which the manuscript or typescript is composed. The writer of the letter has no rights in the physical object at all, save for the somewhat dubious right to access to a copy of the letter if he should wish to publish it — if it is still in existence and he can find it. The recipient of the letter may destroy it, sell it, or do anything else he likes with it except publish it. And he may even publish it legally, under certain circumstances, i.e., if it sustains his position in a controversy in which the recipient's reputation is at stake. (79)

What then does the common law right of the author of a letter consist in? It is merely a means by which he, or his heirs in perpetuity, may, under normal circumstances, prevent the publication of his letter, or, in rarer circumstances, may first publish it. Since relatively few letters are ever published, this right is, by and large, a negative right. It is primarily the right to prevent publication, and it would appear to be one of the few cases in which the right of privacy has remained practically an absolute right.

While a man may, under his right of privacy, enjoin the use of his name or photograph in a commercial venture without his approval, he appears to have no such right with respect to publication of his name and picture in a news story. The difference appears to be "commercial use" versus "non-commercial use in the public interest." Does this theory apply to the use of manuscripts by scholars? No certain answer can be supplied to this because there have been no such cases before the courts.

Certainly, if, as indicated by the Statute (T.17, Par.2), the courts should hold in such a case, as they have generally held in others, that all unpublished manuscripts are absolute personal property and that any use of such material is a violation of common law rights, then scholars, libraries, and other scholarly institutions have

been violating common law literary property rights by the thousands for at least one hundred and fifty years.

While the right to privacy is an important right, does it extend in perpetuity?

In *Munden v. Harris* (238) it was stated that relief could not be had on the ground of the deceased's right of privacy, as that right necessarily died with her.

According to most Courts, however, the common law rights of authors, and their heirs, in unpublished manuscripts may extend in perpetuity. Does that mean that a scholar who finds a manuscript or a painting in a tomb 5,000 years old must first determine who its author was, trace his heirs through the millennia, and obtain permission from all of the (possibly countless) heirs before he may make the text or reproduction of his discovery available to the world? If that is true, then archeology might well become a minor branch of genealogy. To date none of the heirs of King Tut have brought suit, but the courts, State and Federal alike, have consistently held that the only act which ends this right is a dedication or a "general publication" by the owner of the common law right.

This is not a *reductio ad absurdum*. The question is of great importance for scholars. Few scholars will knowingly violate the law or the rights of others. But what are the rights of scholars? What use in the public interest may a scholar make of an "unpublished manuscript"? The common law, insofar as it deals with personal letters, tells the right of Susie Tut-Ankh-Amen, a mythical distant cousin, to control her letter to her friend but does not tell how Professor X, Harvard, 3994, A.D., may use her message after deciphering it, without running the risk of being sued by her heirs.

True, the probability of a suit for publishing unpublished matter of that age seems remote. However, what are the rights of scholars in the use of letters from Orville Wright to Octave Chanute. Or, if letters from former President Harding to a friend, throwing new light on American history, were discovered, would scholars have any right to use and publish them? Can a library legally exhibit them, copy them, or permit general public access to them? The answer according to the decisions would appear to be no, to all of these questions, if the terms "publish" or "use" are defined rigidly.

Perhaps all this is borrowing trouble. After all, scholars and libraries have been using manuscripts for many years and to date no

suits involving the reading of manuscripts in libraries have been recorded. Does long practice in this regard make it legal? If so, at what time after the writing does it become legal? Or does the right to privacy disappear, except against commercial violations? (217, 238)

How long should this right extend? And why has it been ruled a right in perpetuity? No reasoned law has been placed upon the statute books to define this right. And to date, the suits which have been brought have all had to do with money. No record has been found of a trial of the rights of scholars to use and interpret manuscripts and to publish books which make it possible for others to understand earlier civilizations. Of course, this may be attributable, in part at least, to the fact that modern scholarship is modern, and thus post-dates the concepts which have become engraved into the sturdy structure of the common law.

It appears probable, however, that the common law, as it now stands, even though no suits have yet been brought, is potentially a hand reaching from the grave to stay the advance of knowledge.

Summary — Right of privacy. — The right of privacy is an important right. It should be protected. However, the right of scholars, too, is an important right, and scholars should be protected in their right to study all evidence on the development of our civilization. The right to privacy, the right to prevent publication, should adequately be protected if it were limited to the lifetime of the author, and possibly for a few years into the life of his progeny. After that, the demands of privacy having fairly been met, the right to make merchandise of the manuscript might well either be covered by statute, or might fall into the public domain.

If this were done, then privacy would be substantially protected and the scholar would know what is permitted to him. As the common law is currently interpreted, it does not appear to differentiate between the right of privacy and the right to participate in any profits which may accrue from the writings of an author.

This brings us to the second, and most frequently contested, basis of literary property — the right to make money from the sale of one's literary efforts.

Right to Profit

The history of statutory copyright is woven closely about the author's right to share in the profits resulting from dissemination of the results of his labor after it has been published to the world.

Common law rights protect this same interest prior to publication, and most of the American court record in cases of common law property has been built around the right of the author to use his manuscript for profit in any way he sees fit and to restrain others from using it in any manner without his permission, until he has dedicated it to the public.

There are many different ways in which different types of manuscript may be used for profit. Many of these did not exist during the period in which the main concepts of our present philosophy of common law rights were developing. For example, before the existence of radio, a hotel could not profit by reproducing a broadcast of unpublished or published music over a loud speaker in the lobby.

The preamble to the copyright act passed by the Connecticut legislature in 1783 (Acts and Laws of Connecticut, January, Session 1783), stated,

It is perfectly agreeable to the principles of natural equity and justice that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings, which may do honor to their country and service to mankind.

It is generally recognized that one has a right to the fruits of his labor (15), and it follows that no one has the right to take the results of the labor and expense incurred by another for the purpose of a rival publication (97).

The artist or author is entitled to any lawful use of his property whereby he may get a profit out of it. It is the commercial value of his property that he is protected for, to encourage the arts by securing to him the monopoly in the sale of the object of the attraction (103, 150).

Even with some uncopyrightable material, such as news, the right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with those who gathered it is a very different matter (12), and the Doctrine of Fair Use does not apply to commercial uses, such as advertising a product (95).

The legally protected interest in copyright is, thus, the author's interest in the potential financial returns from his compositions (11, 150).

Moral Right

The moral right of authors consists of the right of the author to control misuse of his publication, to prevent distortion in publication, or to control its use subsequent to general publication, regardless of copyright statutes or the fact that the publication has been dedicated to the public. Under the philosophy of moral right, as stated by Judge Seabury in New York Supreme Court, Appellate Div., in *Clemens v. Press Publishing* (51),

Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties. The man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him to do so, cannot make as free use of it as he would of the pork which he purchased. The rights of the parties are to be determined primarily by the contract which they make, and the interpretation of the contract is for the court. If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out under another name than the author's, nor can he omit altogether the name of the author, unless his contract with the latter permits him to do so.

The position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name or to perform it before the public necessarily affects his reputation and standing and thus impairs or increases his future earning capacity . . .

However, well as this defines the concept, it was just the opinion of Judge Seabury and the majority of the Court did not agree. In this respect the majority said,

Title to the manuscript having passed by the completed contract made on August 3, 1909, the defendant was not obligated to publish it at all, nor could plaintiff compel or prevent its publication with or without his name. The objections, refusals, and wishes of the plaintiff after parting with the title in

the property may betray the eccentricities of the author; but they have no greater weight in law than the wishes of a stranger to the transaction after it was consummated.

An author, thus, is not entitled to have his name appear in his book (124, 223), and even announcing the performer's name in connection with a broadcast of an uncopyrighted record is neither an invasion of privacy nor unfair competition (240).

Failure to include the rights to screen credit in a contract was said to divest the plaintiff of all rights generally known as moral rights of authors, which rights include the right to credit as author of a work (231).

A somewhat different aspect of the philosophy of "moral right," is the idea that an author may have the right to prevent the use of any of his works in promoting a cause counter to his principles.

This point was treated in *Shostakovich v. Twentieth Century* (161) in 1948. In this case the Appellate Division of the New York Supreme Court said,

The wrong which is alleged here is the use of plaintiff's music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology. The logical development of this theory leads inescapably to the Doctrine of Moral Right (53 Harvard Law Review). There is no distortion of the composition nor any claim that they have not been faithfully reproduced. Conceivably under the Doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works . . . So, too, there arises the questions of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked for on either theory.

Two additional cases which show that the Doctrine of Moral

Right has to date been rejected by American Courts are the cases of *Morton v. Raphael* (124) and *Vargas v. Esquire* (186).

In *Morton v. Raphael*, the Illinois Appellate Court quoted "As the author has no inherent common-law right to have his name used in connection with his work, his name may be wholly omitted from the work, if the Proprietor of it sees fit so to do . . ." (124).

And the Seventh Circuit Court of Appeals said in 1947, in *Vargas v. Esquire*,

Plaintiff advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called "moral rights" of the author, said to be those necessary for the protection of his honor and integrity. These so-called "moral rights," so we are informed, are recognized by the civil law of certain foreign countries. . . . The conception of "moral rights" of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decisions or writers.

One aspect of moral right does appear, however, to have been recognized. Use of an author's name in a version revised so extensively as to be a different story, so that it amounts to discarding the story and application of the author's name and the title of his story to a wholly dissimilar tale, is subject to injunction preventing such use (222).

However, it is the general rule that a person has no such exclusive right to the use of his own name as to prevent the assumption of its use by another (233).

It is very interesting to note that what cannot be achieved under Doctrine of Moral Right is quite commonly achieved through statutory copyright. Since the copyright proprietor has the right to permit or deny permission to multiply copies, he can and does frequently prevent the abuse of his publication, or such use as is counter to his principles, by denying permission to reproduce. As stated by Dr. Morris Fishbein of the American Medical Association before the Third Annual Meeting of the Association of Honorary Consultants to the Army Medical Library (200),

We are concerned with it [copyright] greatly in our own publications, because quite frequently some patent medicine manufacturer will pick up an article from the "Journal" and make 10,000 reprints and circularize the profession; then we have to notify him that everything is copyrighted and cannot be

copied without express permission, the copyright happens to be ours. In that way we stop the circularization of a good deal of printed material . . . for an unethical purpose.

A letter from Mr. Robert S. Gill published in the minutes of the same meeting, states,

Copyright protection is not merely for the purse of the copyright holder. It protects also against abuse . . . I have in mind the extraordinary case where a fly-by-night whiskey outfit utilized, without authority, an article from our *Journal of Pharmacology* for the purpose of promoting sale of its product. Without copyright protection, we should not have been able to stop that.

Much additional, similar testimony could be cited to show that prevention of unethical use, which is one form of exercise of the moral right, is necessary to modern society. Not only is it necessary, but as shown by the above quotations, it may be and is achieved through exercise of the rights of the copyright owner in cases in which material is covered by statutory copyright. However, when a scholar permits his writing to fall into the public domain, he does not retain any legally recognized rights, moral or otherwise, over its subsequent use or abuse.

Right to Credit

As noted under "Moral Rights," the courts have ruled consistently that an author does not have any common law right to have his name reproduced in connection with his writings. There appears to be no case, except for the minority opinion of Judge Seabury, which approaches the recognition of such a right.

Yet the right to receive credit for his writing may well be a more potent incentive to publication, which is the objective intended by the Constitution of the United States, than is the right to share in the direct monetary earnings resulting from the sale of published copies of the author's works.

Probably the reason for the failure of common law to protect this right is that the common law was first interpreted, and when its precedents were being formulated, the pattern of publication was quite different from our present pattern of publishing.

In the early eighteenth century, when Anglo-Saxon civilization progressed to serious attempts to recognize and protect literary property, there were few scientific journals. The writings to be protected were not primarily scientific communications, which are written, in large measure, for the purpose of advancing civilization.

Rather, when our concepts of literary property rights were evolving, the thing to be protected was predominantly the book or pamphlet written for sale and published for profit.

As the types of materials and their various forms of expression multiplied, the courts have attempted to fit the concepts of another day, which still underlie both common law literary property and statutory copyright, to modern conditions. However, this appears to be one of the large areas which has been neglected.

The "right to credit," i.e., the right to receive recognition for constructive contribution to the written record of science, is a very important right. Publication of contributions to knowledge is the only form of advertising which is considered ethical among the professions. While the man who writes a book may expect or hope for monetary profit, that is rarely true of contributors to American scholarly periodicals. In our modern civilization, with probably as many as fifty thousand scholarly journals, few of which pay their contributors, the only compensations an author receives from making his writings available to the world are the satisfaction of contributing to knowledge and the investment in his professional future, which results in stimulation of his professional advancement or recognition of his contribution. If his name need not be included, the incentive for publishing scientific literature would be greatly reduced.

All of this, of course, seems academic, because it would be rare that a publisher of a reputable scientific periodical would want to omit the name of the author of any of its articles. The reputations of its authors build the reputation of the journal. However, there are two respects in which this concept of a Right to Credit might be of vital importance to scholars.

The lesser of these deals with the right to credit in quotations from an author's text. If the Right to Credit were recognized in law, then failure to credit the source would be a violation of law, instead of merely being bad manners, and a corresponding improvement might be expected in this respect.

The more important aspect of this "Right to Credit," however, is that it may be in direct conflict with the right to restrict or control distribution, which is inherent in both common law literary property and in statutory copyright.

Periodical articles, which are published by the tens of thousands, rarely are protected in the name of the author. If they are protected

by statutory copyright at all, a question which will be discussed below, they are generally protected in the name of the publisher. The publisher's interest in the publication is to sell copies of the entire issue or volume for profit. If he does not sell copies at a profit, he should soon be a bankrupt ex-publisher. The author, however, may be interested in the widest possible dissemination of his writings, and, if someone should be willing to reprint ten thousand extra copies of his article for free distribution, that should ordinarily make a great additional profit in terms of professional credit for the author. The author's judgment in such a case must, however, be further conditioned by the fact that, if enough articles were reprinted from any journal, that might theoretically reduce the sale of the journal to such an extent that there would be no journal in which to publish.

Of course, scholarly journals generally provide reprints to the author, which is evidence that some supplementary publishing of articles in a journal is beneficial to the author without harming the journal. Since the number of reprints supplied is generally limited only by the number the author is able and willing to pay for, there appears to be no evidence that reprinting of articles reduces the sale of journals; there is some evidence that it may increase the sale of journals by providing samples of their content, and such reprinting is in the interest of the author's "right to credit."

Since both common law rights and statutory copyright are for the benefit of *authors*, and the rights of proprietors and publishers are derived from franchises to authors and are secondary, the principle of the "right to credit" should receive recognition in the public interest and in the interest of scholars.

The common law aspects of this right are related quite closely to an author's right to choose whether he will protect his manuscript or permit someone else to do so, or whether he will dedicate it to the public. If the author intends to dedicate his manuscript to the public the copyright of the issue of the journal which contains his article does not copyright the article.

CHAPTER IV

Common Law Literary Property

That the common law literary property right in an unpublished manuscript is property, and that the author may obtain redress against anyone who deprives him of it or by improperly obtaining a copy endeavors to realize a profit by its publication has long been recognized (191). This common law property right in unpublished works is independent of legislation, and the sole proprietorship is in the author and his assigns (135, 14, 31, 36, 86, 140, 167).

Cases running over more than one hundred seventy years indicate that this right of the author to publish or suppress publication of his correspondence is absolute (15).

The existence of the common law right is of great importance for the scholar. It means that his manuscripts are protected as his absolute personal property. The right accrues automatically by the very act of writing, and its creation is independent of statute. This common law property right is not affected by the Copyright Statute (197), which states, in Title 17, Section 2,

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

Common law literary property is intangible property. There is a distinction between the property of a creator in his idea and his property in the manuscript setting forth his idea (property in a personal chattel) as well as his right to prevent others from reproducing his expression of his idea — the present-day common law right to make the original publication (36). The literary property is, therefore, quite independent of the paper and ink of which the manuscript is composed (36, 45), and even the transfer of a manuscript of a book will not, at common law, carry with it a right to print and publish the work without the express consent of the author, as the property in the manuscript, and the right to multiply copies, are two separate and distinct interests (166, 167).

The property in the copyright is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer (167).

What Rights are Granted by Common Law?

The basic right of authors which is recognized by the common law is the right to make first publication, or to restrain others from first publishing his work (191, 180, 188, 15, 39, 14). For this reason, the common law copyright is sometimes called the right of first publication. It is simply the sole right to decide by whom, when, where, and in what form, a manuscript shall be published for the first time; to restrain others from publishing it without the author's permission and from using it without his authority. The law permits "fair use" of copyrighted material. It does not permit "fair use" of unpublished, uncopyrighted material (86).

Interpretation of the term "publish" is provided in a later chapter. The term "use" is dealt with in part, insofar as use by copying is concerned; however, there appear to have been no court decisions which define this term in the absence of copying.

How Long Does Common Law Right Endure?

There appears to be no limitation on the duration of the common law literary property right, and it has been held that the owner of the common law copyright has a perpetual right of property (31, 188, 135).

This common law right persists to the moment of publication (18), and a book which has been printed but has not yet been distributed has not been published (27).

How Is the Common Law Right Terminated?

A common law literary property right is terminated only by abandonment or dedication to the public. Publication is dedication to public use.

The author may give his manuscript to a public institution, place it in a public place or office or indicate in other ways that he no longer wishes to control his manuscript.

While some courts have held that *intent* is essential to dedication, others have held intent is immaterial.

It has been stated that a dedication by the author to public use is not required to make the design public; any way by which the novelty or design is communicated or made known is a publication

(83) ; and the United States Supreme Court ruled that, if the author permits publication of his work, he has abandoned it to the public regardless of his actual intention not to make such an abandonment (94).

On the other hand, in 1918 the United States Supreme Court said, "Abandonment is a question of intent . . ." (97), and similar opinions have appeared since that time. Thus, if intent to dedicate is required, then the author retains ownership of the work until he relinquishes it either by contract or by unequivocal act indicating an intent to dedicate it to the public (104).

Whether *intent* to dedicate must be shown is thus not entirely clear; yet in a considerable number of cases the courts have assumed that intent *can be inferred* from the author's acts (139, 108, 98, 56, 65, 194, 188). It has even been stated that the act of applying for statutory copyright must be held to be an abandonment of the common law right (139).

But, while intent to dedicate or abandon may apparently be inferred from the author's act, or, possibly dedication or abandonment may occur through an author's act despite his intention not to abandon or dedicate, this does not appear to be so positive a finding with respect to the other means by which an author may divest himself of his common law right — i.e., by contract authorizing someone else to make the first publication. Since the question of ownership of the common law rights is fundamental to securing copyright as well as to various aspects of the common law right, it will be treated fully in a separate chapter. It is sufficient to note here that the question of ownership of the common law right is always of fundamental importance in determining whether a general publication has actually occurred and is sufficient to end the author's common law right.

It does appear clear that the act of dedication must be an act by the owner of the common law literary property or, if by another, with his consent. A general publication of a manuscript without permission of the owner of the literary property does not dedicate the manuscript or destroy the common law literary property.

CHAPTER V

What Is Copyright?

In its original sense copyright was, as the separate words stated, a copy right — or the right to multiply copies. It was to protect authors in their right to profit from the multiplication of copies of their works after they had been first published that the first copyright statute was passed during the reign of Queen Anne, and the same philosophy underlies our copyright law, as is shown in the preamble to the act establishing copyright in Connecticut in 1783 (26).

The copyright is simply an exclusive right to the multiplication of copies after the first general publication (167).

If it were not for the copyright, publication would dedicate the manuscript to the public; but copyright reserves the sole right and liberty of printing, reprinting, publishing, and vending the same to the author or proprietor (135, 138, 140, 56, 94, 180).

Not only is the copyright limited to the multiplication of copies after the first publication, it is further circumscribed by the fact that it is completely a creation of statute and is limited by that statute. In his country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in Article I's 8, "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years (7).

It should be noted that each word expressing rights granted by the statute must be used in a limited sense. The word "vend," for example, applies to the first vending of any copy and is not intended to confer upon the holder of the copyright any further right after he had exercised the right to vend for the first time secured to him by the Act. Thus, anyone may vend a second-hand copy (173, 198).

A good definition of copyright (which may serve also as a definition of literary property of both types) was provided by the Fifth Circuit Court of Appeals in 1948 in *Local Trademarks v. Price*. (110). It states: "A copyright is an intangible, incorporeal right in the nature of a privilege or franchise and is independent of any material substance such as the manuscript or plate used for printing. It is entirely disconnected therefrom."

The words "privilege" and "franchise" should be noted particularly in the above definition. They apply more accurately to the statutory grant than does the word "right" since copyright, as will be noted below, is a creature of statute and is a limited thing, circumscribed and delimited by the statute, rather than a right.

Differences between Common Law Rights and Copyright

There has long been confusion between common law literary property rights and copyright. Even the courts' decisions appear to confuse the two, particularly with respect to the concept of "limited publication." For example, we have uniformity of decisions to the effect that a general publication ends the common law literary property. In view of the fact that limited publication is an attribute of common law rights only, it is difficult to understand how the court could rule in *Schellberg v. Emphringham* (154) that distribution of reprints after a general publication had been made was a "limited publication."

The two types of literary property never coexist. As stated by the statute, Title 17, paragraph 2,

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of such unpublished work without his consent, and to obtain damages therefor.

Since the copyright law does not affect any rights at all prior to general publication and the common law literary property right goes out of existence upon a general publication, it is difficult to see why the two should ever be confused.

The key point is the fact that the rights do not coexist in the same composition; when the statutory rights begin, the common law right ends (30). And the very election by the owner of a common law literary property to avail himself of the statute must be held to constitute abandonment of his common law right (139).

This would mean that the act of applying for copyright, whether the work is otherwise published or not, would constitute an abandonment of the common law right.

The concept that common law rights and copyright may not coexist has been further developed in several cases. Since the common law right is perpetual while copyright gives a special franchise for a limited period, it would be difficult to justify provision of perpetual copyright by a mixture of the statutory protection with common law protection, in view of the specific limitation on duration of copyright in the Constitution (98).

It appears clear that common law literary property rights and copyright cannot coexist; when they appear to do so, there is confusion in the interpretation.

The United States Supreme Court has pointed out the basic difference between common law literary property and copyright, saying, "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world." (191)

Repeated decisions indicate that copyright is secured solely under the statute, and that the common law control of the manuscript before publication is superseded by the statutory grant after publication (140, 94, 180, 14, 64, 36).

The copyright statutes do not provide for the continuation of a common law right, but under constitutional authority created a new right (64).

Other important differences between common law literary property rights and copyright are:

a) The common law literary property right accrues to the author automatically by the act of creation of any "writing." Copyright, on the contrary, is a franchise granted by a statute and compliance with every requirement of the statute is essential if the author wishes to obtain or retain a copyright.

b) Common law literary property is relatively absolute personal property and is subject to as complete control by its owner as is real property. Copyright is a limited property granted in the

public interest, and any powers it grants must be justified in terms of the public interest.

Mr. Justice Holmes said in *International News v. Associated Press* (97), that in copyright and patent cases the plaintiff has no absolute right. He went on to say, "If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified . . . "

Common law literary property rights may endure indefinitely, while copyright must, under our Constitution, be granted for a limited period.

Use of common law property is controlled by the owner, but copyright permits fair use. While the test for determining whether there is piracy is the same in both cases, the only distinction between the two classes of cases is that the law permits "fair use" of copyrighted material. It does not permit "fair use" of unpublished, uncopyrighted material (86).

What Is Copyright Intended to Achieve?

The Copyright Act does not fully define its objects, and the intent of the legislators in passing the Act has frequently been considered by the courts. Construction of the purposes to be achieved by the Act is, of course, of utmost importance in interpreting the meaning of its words.

The intent of the House Committee on Patents was covered in their report on the present Copyright Statute (198). However, this does not necessarily convey the total background of the Act.

In construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

It is true that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used, we must remember the objects and purposes sought to be attained (7).

The question of the intent of the Act is essential if the copyright statutes are to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended

to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant (30).

The philosophy underlying the granting of copyright privileges is exemplified by the preamble to the Connecticut Copyright Act of 1783 (26), which states, "It is perfectly agreeable to the principles of natural equity and justice that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country and service to mankind."

The basic justification for granting a monopoly to authors is that there is a public interest in having subsequent workers in a field allowed to make use of the accumulated knowledge of the past (8).

The constitutional power to enact the Copyright Act derives from Article I, Section 8; that Act would be void if it went beyond granting monopolies to "promote the progress of science and the useful arts." (46) The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127; 52 S. Ct. 546, 547; 45 L. Ed. 1010, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress: "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright (181). The object of copyright is to promote science and the useful arts (21).

It appears to be quite clear from the above decisions that the primary objective of any copyright law in the United States must be, in the words of the Constitution of the United States (198), "... to promote the progress of science and the useful arts . . . "

If the statute does not do that, it is unconstitutional; and, if it interferes with the progress of science and the useful arts, it is unquestionably unconstitutional.

That the Congress recognized this fact is shown by the statement of the Committee on Patents, 60th Congress, 2nd Session,

which, on February 22, 1909, in recommending the passage of the present Copyright Statute, said (198),

The Constitution of the United States provides, Article I, Section 8 —

Congress shall have the power . . . to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

It will be noted that the language of this authority limits the power of Congress by several conditions: The object of all legislation must be (1) to promote science and the useful arts; (2) by securing for limited times to authors the exclusive right to their writings; (3) that the subjects which are to be secured are the "writings of authors." It will be seen, therefore, that the spirit of any act which Congress is authorized to pass must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result, it would be beyond the power of Congress.

The enactment of copyright legislation by the Congress . . . is not based upon any natural right that the author has . . . but upon the ground that the welfare of the public will be served and the progress of science and the useful arts will be promoted . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given . . .

As further evidence of the objective of copyright legislation, and of the importance of construing the act in the light of its constitutional objectives, it should be noted that copyright, in analogy to patents, is to reward originality and inventive genius, and to encourage it to put out its productions for public enjoyment and benefit, which otherwise the author or proprietor might withhold, having right and power to do so, for his exclusive use and pleasure (42). If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw those ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation; and science would be hindered by copyright instead of being promoted. There is an important distinction between copyrights and patents. Letters patent give a monopoly to make, vend, and use, while copyright does not give an exclusive right to use. Copyright protection is extended to authors mainly with a view to inducing them to give their ideas to the public so that they may be added to the intellectual store, accessible to the people, and that they

may be used for the intellectual advancement of mankind (72, 21, 55).

A narrower interpretation is that, while these statutes should be given a fair and reasonable construction with a view to protecting the author in such manner that he may have the benefit of the property right conferred for a limited period of years, it is clear that this protection should not be extended beyond the express language of the statute, nor a property right created which was not within the mind of Congress when the act was passed (151).

It thus appears clear that the very purpose of publishing a book on science or the useful arts is to communicate to the world the useful knowledge it contains. But the object would be frustrated if the knowledge could not be used without incurring the guilt of piracy (55). The object of copyright is and must be the advancement of the sciences and arts, and granting a monopoly to the author is the means rather than the object of copyright.

As noted above, copyright is a franchise granted in the public interest, and its object is to advance the arts and sciences by encouraging the dissemination of materials which might otherwise be withheld. Thus, it is a form of contract between the United States and each author under which the author agrees to make his writings available to the general public in return for the special protection offered to him; and the United States undertakes to protect the author's exclusive right to "print, reprint, publish, copy and vend the copyrighted work," in return for his release of his writings to the public for all uses which are not reserved to him by the Copyright Act.

This concept of statutory copyright as a two-way contract is inherent in the interpretations above, which appear to make it quite clear that the monopoly granted to authors is not the objective of copyright, but merely the means by which advancement of the arts and sciences may be effected. If, however, we view copyright as a contract, implying as that does bilateral agreement and action, can an author who has obtained a copyright withhold the copyrighted material from the public? What must the author do by way of making his copyrighted work available to the public in order to fulfill his part of the agreement? If the author wishes to withhold his work from the public or from any part of the public, does his copyright permit him to do so?

The language of the statute appears to be quite clear in requiring that the author make his work available to the general public if he wishes to avail himself of the Copyright Statute. The Statute, Title 17, Section 10, states, "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title"

Thus, a general publication, i.e., an act which makes the work available to any one or more members of the general public is, under the Act, prerequisite to obtaining a copyright. Although works generally distributed need not be deposited to obtain copyright, works not reproduced for sale must be deposited at the Library of Congress, where they are available for public consultation, if the author wishes to obtain a copyright. As stated in the Statute, Title 17, Section 12 of the Act, "Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright"

Thus, it appears that the Act accords with the spirit of the Constitution in respect to requiring that an author who wishes to avail himself of the benefit of the Act must, in payment therefor, make the work to be protected available to the public (168).

Most decisions bear out this position, but there does not appear to be complete agreement as to how far or to what extent the author must make his copyrighted writings available.

The only statement indicating that an author need not make the copyrighted work available appears in *Fox Film v. Doyal* (81) in which Supreme Court Chief Justice Hughes said,

. . . the owner of a copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from the property The sole interest of the United States and the primary object in conferring the monopoly lie in, the general benefit derived by the public from labors of authors.

Positive as this statement seems, however, in indicating that the author need not make his copyrighted publication available to the public, it does not really say that. Justice Hughes was talking about what the author must do after he has obtained copyright—which act automatically involves making one or more copies available to the public.

If there be any question of the intent of Chief Justice Hughes' statement, that is dispelled by the fact that in 1948 the statement

was itself further interpreted in *United States v. Paramount* (181), as follows,

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film v. Doyal* . . . Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to authors serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright.

The above statements raise several other interesting points. Was it the intent of the act and of the Constitution that only one or two copies need be made available in the public interest? Does the author have to supply the work in all the forms in which it is protected to any member of the public? And, if copies are made available but are withdrawn, so that no copies may be consulted by the public, does that defeat the copyright?

If Judge Hand's interpretation of the position stated in *Bouci-cault v. Hart* (168), is correct, then the author is bound, under the intent of the Act to make the work generally available to anyone who is willing to pay the price he sets for it.

If the author can practice total exclusion of others from use of copyrighted materials, he would appear to be able to defeat the constitutional purposes of copyright.

It is apparently possible under our statutes to secure copyright without having anyone see the inside of the book. It might be "published" by placing it in a public place or by offering a copy for sale. Even if no one looked at it in the public place or bought the copy offered for sale, as will be pointed out in the chapter on "Publication," such acts as these are general publication; and, if the book contains the proper notice, it would have complied with the provisions of the statute and would be copyrighted. Deposit is not necessary to secure copyright. It may be argued that there would be no point in such action since the author would thereby give up a perpetual right under the common law literary property right in order to gain a lesser right for a limited period. Yet that is exactly what has happened in the case of certain "business services" which have attempted to superimpose certain common law concepts such as the right of "limited publication" upon a statutory copyright (98). Such

cases as this are responsible for a considerable part of the confusion between common law literary property rights and copyright.

Out of the right of a common law literary property's owner to make a limited publication, there seems to have grown the idea that it is possible for a man, by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common law right of first publication. If that position had been sustained by the courts, that would have resulted in judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute. But the court held that the common law right could not be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than Congress has been willing to grant to him the exclusive right to publish (98).

If the concept of limited publication does not apply to copyrighted materials and if the author does not make available copies to the public in certain cases, it is difficult to see just how science may be advanced by the copyright statute in those cases; unless we conceive of authorship as such as the thing to be protected—i.e., that writing as such, whether it be made available to the public or not, is a means of advancing science. That position does not appear tenable in the light of the cases cited above; and if it were it would not justify a copyright statute because the protection automatically afforded to unpublished manuscripts by the common law is much more positive than that afforded by statute.

Having concluded that in order to justify protection by the copyright statute the writing must be made available to the public, it might be well to determine what is meant by the term "available to the public."

Does sale of a single copy, or deposit of copies with the Register of Copyrights make a book adequately available? The Statute appears to require no more.

If the constitutional purposes of the Act are not meant to be accomplished by unlimited dissemination of the copyright subject, but by giving the artist the advantages of monopoly with a free choice of methods of exploitation (23), can the author claim the benefit of the act without giving the public anything in return?

Certainly it is not reasonable to require that each copyrighted article be issued in every form in which it is capable of being produced.

Theoretically, any scholar who has enough time and money could, if he knew about it, inspect the object copyrighted during the period it was available for inspection. Perhaps, paintings require this latter kind of protection but, if so, they should be covered by a different statute than one which is promulgated as a copyright.

The fundamental question would appear to be whether the primary object of copyright legislation is really the promotion of communication; whether the object is merely the protection of a financial interest of authors; or whether we have been confused as to what the object of copyright really is.

Assuming, however, that it was the intent of Congress that acceptance of statutory copyright by an author certifies his acceptance of a responsibility to make the copyrighted work available to the public—just how and to what extent must he do that.

To hold that deposit of copies in the Library of Congress is sufficient would appear to substitute a token distribution for genuine dissemination. The publication may be kept in the Copyright Office for restricted use; it may be put into the collections of the Library of Congress, which makes it open to access by those scholars who can either come to Washington or borrow it through inter-library loan; or it may, at the discretion of the Librarian of Congress, be discarded, so that the public is not guaranteed access to a single copy throughout the life of the copyright.

Even if the author makes the publication available generally by publishing and selling an edition, is he bound, morally or otherwise, to supply copies to anyone who is willing to pay the price throughout the life of the copyright? If he permits his book to go out of print, yet can restrain anyone from reprinting, does he not, at least partially, defeat the constitutional purpose and the legislative purpose of copyright?

In the case of *Lawrence v. Dana* (109) in 1869, respondent's counsel said,

All the copies of Dana's edition, owned by Little, Brown and Co., would be lost. The suppression of Mr. Dana's notes would be a public loss, and the court cannot pick out and suppress a few references and leave the rest standing. No injunction has ever been granted in copyright cases, except upon the ground of protecting a pecuniary and existing interest in an existing book.

Complainant's counsel said, "The Act of Congress does not require complainant to keep copies on sale."

Unfortunately the court did not decide this issue, and the question has not been raised in later cases in which it might have applied. In *Washingtonian v. Pearson* (187), for example, the publication was not only out of print, but its publisher was out of business; yet a substantial award was assessed for copying an article from the defunct periodical, which was not available for purchase.

If the object of copyright is to advance learning by encouraging authors to make their writings available to the general public, and the means is rewarding the author with a monopoly in return for making his works available, should not society, in the public interest which alone justifies this grant of franchise, require that the copyright proprietor keep his part of the bargain, and make his copyrighted work available to all during the full life of the contract?

If the copyright owner is not required by the statute to keep, or to permit others to keep, his copyrighted work in print in some form, then the act tends to prevent the dissemination of knowledge rather than to promote it because

1. Scholars are confused as to whether it is permissible for them to take a copy in any form for any use;
2. Institutions which make copies for scholars follow varying courses depending upon their own interpretations of the Act and of the rights of scholars;
3. The cost of obtaining copies is excessive because of the need for writing to various sources instead of to the copyright proprietor;
4. The time taken in getting clearance is excessive and makes the material useless in many cases, particularly in scientific and technological research;
5. Copyright owners vary in their own interpretation of their rights and make varying conditions;
6. While most copyright owners respond promptly, some do not answer letters at all;
7. Since the owner of the copyright of a volume may not own the copyrights to all the material in his volume, his permission to copy from his journal may be of no legal value; and,

8. The material in a copyrighted publication is not invariably all covered by one copyright, so that valid permission to copy a few pages from a newspaper or a magazine may require writing to several different copyright owners.

If we think solely in terms of "letter-press printing of editions," as we have in the past, it would, in many cases, be economically impossible for the author to keep his work permanently in print. However, modern methods for economical production of single copies are just as available to a copyright owner as they are to others. A requirement that the copyright owner supply copies in one form or another of whatever he elects to protect (whether that be the work as a whole or extracts therefrom) is not only perfectly feasible but might add an additional source of revenue for the copyright owner while ensuring more fully the public benefit intended by the Constitution.

If the copyright owner, to retain his copyright, were required to keep his work "in print" in some form throughout the life of his copyright (which he may possibly, in fact, now be required to do by the intent of the Act), then that would remove many bars to access by scholars to copyrighted materials. This would promote the constitutional purposes of copyright by ensuring ready access by the public to copyrighted material; it should provide more adequate protection and more opportunity for profit to authors; and it should remove the time-consuming, costly, and uncertain method of obtaining permission to make copies which is now in vogue.

SUMMARY

1. The *object* of copyright in the United States is to "promote the progress of science and the useful arts . . ." It cannot constitutionally have any other object.

Any action under the guise of copyright which fails to "promote the progress of science and the useful arts . . ." cannot be justified under the constitutional grant of authority to the Congress upon which the Copyright Act is based.

Any action which interferes with the promotion of the progress of science and the useful arts is counter to the purposes of the Constitution and the intent of the Copyright Act, and it cannot be protected by the Copyright Act.

2. The Courts have generally interpreted the Constitution to provide that the way in which the Act should "promote the progress

of science and the useful arts . . . ” is, as stated by the Supreme Court in *United States v. Paramount* in 1948 (181, “. . . to induce release to the public of the products of . . . creative genius.” Thus any action which restricts the release of writings to the public would appear to be counter to the intent of the Constitution and of the Act.

3. Copyright is not a *right* of authors. Reward to authors is not the object of copyright. Reward to authors is merely the *means* by which the objects of the Constitution may be achieved. Thus, in all copyright cases, the question of reward to authors must be secondary to the public interest in promotion of the advancement of science and the useful arts, and the rights of authors may be protected by copyright only insofar as such protection can affirmatively be shown to “promote the progress of science and the useful arts . . . ”

CHAPTER VI

Legal Basis of Copyright

As noted above, copyright is a creation of statute; it is bounded and governed by the words and intent of the statute.

Copyright does not, in the United States, accrue automatically to authors.

In order to obtain a valid copyright, the author must comply with every requirement of the statute. If, for example, the word "copyright" is not used, its omission results in omission of the essential facts respecting any copyright. The law, therefore, has not been complied with, and by its very terms no action can be maintained for the infringement of the alleged copyright (90), and there is no copyright in the work.

Congress was conferring a special privilege upon authors and could limit that privilege in any manner it saw fit. In order to secure a valid copyright or a valid patent, it is necessary to comply with every requirement of the law (127).

The subjects treated by the copyright law, which is reproduced in Part II (197), are:

Section 1. The exclusive rights . . .

To print, reprint, publish, copy, and vend . . . to translate . . . or make any other version . . . if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art; . . . To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production; . . . To perform or represent the copyright work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record . . . thereof; to make or procure the making of any transcription or record thereof by or from which . . . it may be exhibited . . . or reproduced; and to exhibit, perform . . . or reproduce it in any manner or by any method.

Finally, paragraph (e) covers the performance of musical composition publicly for profit, including arranging, recording by any means, and mechanical reproduction.

Section 2 provides that common law literary property rights shall not be annulled or limited by this Act.

Section 3 covers protection of copyrightable component parts of composite works such as periodicals.

Section 4 blankets in all "writings" of authors.

Section 5 deals with classification of works for registration.

Section 6 authorizes registration of prints and labels.

Section 7 provides that the copyright of a compilation of works in the public domain or of copyrighted works reproduced with the consent of their proprietor shall not change the copyright status of either of these types of material by virtue of their inclusion in the compilation, but that the compilation as such shall be copyrighted.

Section 8 denies copyright to works in the public domain and to almost all Government publications, and also provides that republication of copyrighted works by the Government shall not void the copyright.

Section 9 tells who may obtain copyright.

Sections 10 to 15 tell how copyright is to be obtained and registered, and how and when deposit shall be made.

Sections 16 to 18 require mechanical reproduction to be done in the United States.

Sections 19 and 20 relate to the form and place of notice.

Section 21 covers accidental omission of notice.

Sections 22 and 23 cover *ad interim* protection of works published abroad.

Sections 24 and 25 cover duration and renewal of copyrights.

Section 26 defines "date of publication" and "author."

Section 27 states that copyright is distinct from the object copyrighted.

Sections 28 to 32 tell how copyright may be assigned.

Chapter II covers infringement proceedings including the statement of penalties, jurisdiction and the like.

Chapter III covers the powers and responsibilities of the Register of Copyrights.

The implications of the various sections of the Act will be discussed under the pertinent subject section.

As will be noted from Section 1 of the Act, the law attempts to cover many different kinds of materials and to provide different kinds of protection for them. Thus, a use which may not be per-

mitted in the case of a drama may be quite permissible in the case of a poem. Protection against public performance or delivery of a copyrighted work is afforded only in the case of a lecture, sermon, address or similar production, a drama, or a musical composition. Other copyrighted works may be recited in public for profit without infringement (106).

Furthermore, while copyrighted music and plays may not be mechanically recorded by others than the copyright owner, other types of material may be so recorded without violation. In the 1909 revision of the Copyright Act, composers were given the exclusive right of recording their copyright musical compositions and the like right was granted to authors of copyrighted dramatic works, but the Congress did not see fit to give like protection to poems, stories or works of that nature (53).

This would indicate that publishing for profit of an edition of a copyrighted novel, essay, poem, etc., on wire recording, disc, phonograph records or other mechanical devices, is not interdicted by the copyright law, regardless of the size of the edition, its potential competition with the copyright owner, or the profits to be made therefrom. The talking book, initiated for the blind, might, if the above interpretation is accurate, become a major legally permissible method for taking away the monopoly which is granted by copyright.

Other phases of the act will be discussed below. It should be noted at this point, however, that, in addition to the Copyright Statute itself, certain other general principles of law appear to apply to copyright, and some general principles which have been applied by the Courts may or may not properly be applied.

De Minimis: The principle of *De Minimis Non Curat Lex* implies that there are certain invasions of legal rights in any field which are of such small value and significance that they do not merit corrective legal action, and will not, therefore, be considered by the Courts. This principle has been applied very generally, but apparently not uniformly, in the field of copyright. It is a very important principle because it appears to provide part of the philosophical basis on the important concept of "fair use," which will be discussed separately.

Back as far as 1839, it was stated that damages to the sale of a journal by extracting an article is probably so minute as to preclude consideration by the Courts (24). However, the decisions have not

been uniform in that respect and in recent cases it has been stated that reprinting of an article from a copyrighted magazine is a violation (73, 187). At times the Court completely disregards the principle of *De Minimis*, saying that damages can only be measured and assessed upon the basis of the damage suffered, and where there is no evidence that there has been any damage, the minimum amount provided for by the statute, two hundred and fifty dollars for each infringement, has been assigned (73). Since the case was not appealed, it is not possible to tell whether the higher court would have recognized the principle of *De Minimis*. However, the principle has been determinative in cases subsequent to the above (56, 92, 84, 141, 117).

On the principle of *De Minimis Non Curat Lex*, it is necessary that a substantial part of the copyrighted work be taken (92, 117), and this doctrine makes it necessary to draw the line between lawful and forbidden use (84).

While the weight of opinion appears to be that the principle of *De Minimis* does affect the interpretation of the Copyright Act, the application of this principle depends upon the definition of the term "substantial," which is not defined.

Clean Hands: The principle of *clean hands* has appeared in a number of cases, and there appears to be little question that it applies to copyright (5, 219, 220, 224, 230, 236). Under this principle, an author who has pirated a large part of his work from others is not entitled to have his copyright protected (178). This conclusion is based on the general proposition that equity would refuse its aid to a suitor who had himself been guilty of the same inequitable conduct which he denounced in others (26).

Law of Assignment v. Licensing: The principles of law determining the difference between an assignment of full title and a partial transfer or license, together with law of contracts, are of great importance in the field of copyright. They determine who is entitled to copyright protection, whether a copyright is valid in some cases, and who may bring suit for infringement. They also determine in large measure whether a copyright covers a specified portion of a composite work. Each of these will be treated below. Moreover, the basic problem of divisibility of copyright rests on this foundation rather than on the Copyright Statute. The question of divisibility is of great importance. It determines whether there can be more than one copyright for one copyrighted work. Can we have a separate

copyright owner for play rights, magazine rights, book rights, radio rights, etc., each able to bring suit for one or more types of alleged violation?

It has generally been held that there can be but one copyright for the same book (190, 116), and, therefore, less than an assignment of the entire copyright cannot carry the causes of action (if the right is invaded) which the act accords to the owner or assignee (126).

The act of the author in selling dramatic rights to another has been held to show that he transferred or licensed to the publisher only a special or limited right, and that, obviously, he could not have sold the dramatic rights if he had intended to divest himself of his copyright by assignment (126).

It must be remembered throughout that the remedies are statutory creations. They have been made drastic to protect authors against wrongful invasions, but they were not intended to be cumulative, so as to subject a defendant to more than one recovery for the redress of one wrong (126).

If the play right and copyright are quite distinct under the statute, in spite of the fact that printed publication will forfeit both, and that one statutory copyright will protect both, then each might be assigned and each assignee might sue. If, on the other hand, the play right and copyright be deemed to be indivisible, in such sense that one may not be assigned without the other, then the fact that the publisher who obtained the copyright is only a licensee under the assignment would be a fatal defect in the copyright itself. For in that case the publisher could hardly be regarded as the "proprietor" of the indivisible common law literary property out of which alone the statutory play right and copyright could be created (78).

This principle applies to the question of implied transfer of copyright which will be discussed in Chapter VIII.

It should be noted that in several cases the courts have leaned over backwards to find that an assignment rather than a license was granted, in order to protect the author. In one of these cases, despite the author's own recorded testimony that he had intended to retain certain rights, the court held that his receipt to the publisher constituted an assignment—thus protecting to him a copyright which he would have lost on his assertion of limited transfer (57).

Until 1948, with few exceptions, it has been held that assignment of the total property was essential to make a proprietor eligible to obtain copyright. In 1948, however, the Fourth Circuit Court of Appeals said, contrary to the usual position, that copyright is divisible (199). However, the Supreme Court reversed this decision and, in effect, held that assignment of the whole is required.

Two other general legal principles which are of importance in this field are the theory of abandonment and the theory of contracts.

In the case of *Washingtonian v. Pearson*, Justice Miller, in presenting the opinion of the Circuit Court of Appeals, raised the question of whether discontinuance of a publication constitutes abandonment of the copyright. This question has not been decided by the courts. However, according to the decisions in common law cases cited above, the general principles of dedication and abandonment would appear to apply to copyright, even though they are not specifically cited in the Copyright Act.

One of the knottier problems of copyright is the relationship between author and publisher, which will be treated below (cf. "Who may obtain copyright?"). However, what does the law of contracts provide, assuming a full and valid transfer to the publisher which would normally enable the publisher to obtain copyright, if the publisher fails to keep his part of the contract? Does the literary property revert to the author? And if so, having permitted its publication by another, has the author lost his common law right?

In some such cases, it is interesting to note that the Courts were dealing with the rights of a publisher but spoke about the rights of authors—and in *Washingtonian v. Pearson*, among many other cases, the two do not appear to be identical. It is difficult to see why a publisher who has failed to pay the author and fails to keep his work available to the public should own the author's work and be able to collect damages or profits resulting from its future use with the author's permission.

While all agree that literary property is intangible property, yet there is a very common tendency for laymen, lawyers and the courts to treat it like physical property. As noted by Judge Seabury (51) sale of literary property should not be considered the same as the sale of a barrel of pork. Yet lawyers and laymen alike argue legal principles which apply to physical objects to apply them to literary property. Shoes, hats, shirts and dresses are frequently

mentioned in such fictitious parallels. Intangible property consisting of a franchise to do something in the future is not quite the same as a dress or shoes or a shirt. The latter type of property, once sold, instantly loses much of its value. The former retains its value through many uses.

Thus, while the question of who owns literary property is a subject of contract, should the man who fails to keep his part of the contract be permitted to prevent an author from using his own creation in the future? Or should permitting a man to publish the intellectual work of another, where there is no clear showing of an absolute assignment of the literary property, be permitted to infer a right of the beneficiary to prevent the future use by the author of his own intellectual creation?

Two recent cases indicate that failure to comply with the contract may return to the author the right to sell his literary property (99, 93).

It would appear, therefore, that general laws may supplement the Copyright Act, and decisions in copyright cases may have to take into consideration other laws in addition to the Copyright Act, but application of such other laws should take into consideration the special nature of literary property.

There has been some confusion, in such matters as determining whether "intent" is necessary for dedication (noted under common law literary property) and determining how the statutory penalties should be applied.

In a number of cases the Courts decided that they were not required to assign minimum statutory damages when the damage is known to be less than the statutory amount (193, 122, 184). Yet in other cases, where the Court was of the opinion that there was no damage and no profit, awards of statutory damages have been made (73).

Similarly, in determining the extent of infringement, the courts have generally considered that the term "substantial copying" refers to copying of a substantial amount of the copyrighted work; yet in some cases the court has decided that the copying was substantial on the basis of the proportion of the allegedly infringing volume which was derived from the copyrighted work (67).

Unfair competition: The concept of unfair competition has appeared in literary property litigation with increasing frequency in

recent years. By and large it is confined to elements, such as ideas, titles or names, which are not protected by copyright or which are denied protection by the Act. (205, 225, 233, 240, 243, 244, 245, 246, 247, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 21, 66, 118, 131, 17)

The injection of this element does complicate the administration of copyright since it means that in some cases there have been two suits for the same alleged offense—one in a State court based upon unfair competition and another in Federal Court based upon copyright infringement. In other cases it has resulted in additional complaints for the Federal Court to consider.

This subject requires clarification. If ideas and titles are declared by Federal law to be public property, can there be unfair competition in their use?

If it is the intent of the Copyright Act that titles and similar elements should not be protected, but should be in the public domain, then no property right is involved. If the Copyright Act does not place these elements in the public domain, then they might well be protected by the copyright law and the complications resulting from the increasing application of the principle of unfair competition might be avoided.

The Eight Circuit Court of Appeals stated in 1913, in *Atlas v. Street & Smith*, "Literary property in a book cannot be protected by trade-mark nor otherwise than by copyright . . . Neither the author nor proprietor of a literary work has any property in its name . . . If literary property could be protected under the theory that the name is equivalent to a trade-mark, there would be no necessity for copyright laws . . ." (14). However, little attention appears to have been paid to this statement by courts considering cases of unfair competition.

Summary

The legal basis of copyright includes the Constitution, the Copyright Statute, and general laws which apply to copyrights among other things. The interpretation of the Copyright Statute, and especially the application of other laws to copyright, has not been uniform enough to permit very accurate interpretation of what the law does mean, at least in certain respects.

CHAPTER VII

What Does Copyright Protect?

Copyright, like the common law literary property right, covers only a manner of presentation. Ideas are not protected by copyright.

Copyright differs from patents in what it purports to cover. A patent application, while reporting the state of the art, must specify the claims which are to be protected. That is not true of copyright. A book which contains almost nothing original may be protected by copyright even though its component parts may be uncopyrighted, and the copyright of the book as a whole will not prevent the reproduction of any of its uncopyrightable parts. The copyright notice on a book, or more commonly on a composite work, does not mean that any part of it may not be in the public domain. It is very important, therefore, to determine just what the copyright is intended to protect.

The statutory notice was intended by Congress to apply to publications as a whole—where the author is copyrighting the work as a whole (26), and when an author combines a copyrighted work with an uncopyrighted work in such a manner that the two cannot readily be identified, he is not protected against republication of the whole of such a work (26). The most important case in this respect is that of *Mifflin v. White* (121) in which the Supreme Court said,

The question presented in this case is whether entering for copyright the last two parts of the "Professor at the Breakfast Table" in the December number of 1859 of the *Atlantic Monthly* by Ticknor & Fields, proprietors of the magazine, was sufficient to save the rights of the author . . .

The entry of the *Atlantic Monthly* by Ticknor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the *Atlantic Monthly* . . . Had the copyright been entered by Ticknor & Fields, as agents of Dr. Holmes, it is possible it might have been sustained, but there is nothing to indicate that Ticknor & Fields were acting for anyone else than themselves . . .

But, even assuming that it was done by his authority, there is an additional question whether the entry of a book called the

"Atlantic Monthly Magazine" in the name of Ticknor & Fields, is equivalent to entering a book called "The Professor at the Breakfast Table" by Oliver Wendell Holmes.

In view of the fact that copyright covers "compilation," "arranging," etc., there is little doubt that the primary unit of copyright material is the work as a whole.

The fact that not everything in a work labelled "copyright" is actually protected is well documented, and there is no way in which one can tell by examining the copyrighted publication, or even by examining the registration in the Copyright Office, just what is protected by the notice.

The general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published, is supported by authority (40). The copyright covers copyrightable parts only (96), and the filing of the title of a magazine is sufficient to secure a copyright of the articles in it, if they are written or owned by the proprietor of the magazine (25).

There can be no question of the validity of such a proceeding if the proprietor of the magazine is the author or the proprietor of all the articles published in it; and if he is the author or proprietor of some of the articles, and not of others, a copyright so registered is valid as to the articles which he either wrote or owns. (80). However, a mere contract authorizing the publication of a story in a magazine does not imply a sale or transfer of the copyright (80, 114, 101) and thus permission to publish does not imply permission to copyright (71, 143). Furthermore, the fact that a law reporter is entitled to obtain a copyright for the matter which is the result of his own intellectual labor, including the title page, table of cases, any headnotes or syllabi, the statement of facts, argument of counsel and index, does not extend the rights he obtains by copyright to the opinions of the courts nor the official statements of fact and syllabi prepared by the court itself (189).

The copyright may cover merely a new arrangement of old materials, and the fact that the author did secure all his material from other publications which were not copyrighted does not prevent him from getting a copyright for his intellectual contribution (193). If he has arranged and combined the material in a new way, and if he exercises skill and discretion in his independent work, he has earned

the right to statutory protection (48, 164). However, the copyright in such cases covers only what the author has created (9), and, since the act declares that protection is extended to "all copyrightable component parts of the work copyrighted," the inference is plain that there may be in that for which claim is made much to which the protection of the act cannot extend (70, 69, 9).

It is necessary, therefore, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it (5, 101, 159).

Not only is the copyright limited by the copyrightability of component parts but may also be limited in scope depending upon the nature of the material (53). For example, advertising copy supplied by the advertisers is not covered by the copyright of the journal in which it appears (131).

Since there may be much in a copyrighted volume which is not copyrightable, the conclusion appears inescapable that the object which copyright was intended to protect was a work as a whole. Not only is this stated specifically in *Bentley v. Tibbals* (26); *Mifflin v. White* (121); *Stone & McCarrick v. Duggan* (172) and others, it is inferred by the many cases cited above in which it was held that copyright covers the author's work of arrangement or compilation. Not only may much, or even all, of the material included in a copyrighted work not be copyrightable, while the book as a whole may merit protection by copyright, but in many cases component parts may be copyrighted independently of the work as a whole.

The position taken by the court in *National Geographic v. Classified Geographic* (125), in which it was held that recompiling without reprinting or copying is a violation, appears likewise to indicate that arrangement of a book as a whole, rather than its component parts, is the primary scope of copyright.

Even the decisions on copyright of periodical articles may be interpreted to refer to works as intellectual units, since the idea here appears to be that each article is a separate unit, capable of being published separately and, frequently so republished, and thus entitled to consideration as "works of authors" even though they are generally published in groups in what are known as periodicals or composite works. The Copyright Act itself appears to embrace this point of

view. Chapter I, Section 3 of the Act states, "The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

Nature of material protected: There can be little question that the only matter which can be protected by copyright is "writings" of "authors." This is the limit of the Constitutional grant of authority to the Congress and it is the limit of the statute.

The Constitution provides that Congress may "... secure ... to authors ... the exclusive right to their ... writings," and the Copyright Act, Chapter I, Section 3, says quite specifically, "The works for which copyright may be secured under this title shall include all the writings of authors."

This limitation of the scope of copyright would make the Act easy to interpret if we could be sure of the meaning of the terms "author" and "writings." The Act itself specifically provides protection for many things, such as works of art, plastic works, music, motion picture photoplays, photographs, and cigar bands, etc., which would not ordinarily, to the lay mind, represent either "writings" or work of "authors."

The Congress and the Courts appear to have covered under these terms the widest possible range of methods of presentation of thoughts, sounds, images or ideas, and there are definitions of the above terms in *Webster's Dictionary* which may conceivably be construed to justify the inclusion of all the types of materials noted in the Act. However, there appears to be a limit to what may be considered a "writing" of an "author" in the legal sense. Thus, a sleight of hand trick by Charles Hoffman, known as "Think-a-Drink Hoffman," was not protected by the terms and provisions of the Federal Copyright Statute (85), and stage business has no literary quality and cannot be copyrighted (204). The primary point, therefore, in determining whether a work is the writing of an author appears to be whether he has made any intellectual contribution of any sort or degree (232), and originality has been defined in the sense that the author has created it with his own skill, labor and judgment (92).

The courts have not attempted to establish criteria of quality as a basis for copyrightability. Anything that a court might recognize as representing independent work of an author may be granted copy-

right regardless of quality or novelty. Indeed, "literature" in the eyes of the law need not be "the highest class of literature" (14). With reference to "novelty," two identical works would both be eligible for copyright protection if they represented writings of authors and if they were prepared independently of each other.

The degree of protection offered by statute depends upon type of material, the purpose which it is intended to serve, and the nature of the use made of it; and different types of material are granted different types or degrees of protection (53, 106). For example, it has been stated that a textbook differs fundamentally from a compilation, such as a directory or list. The latter simply sets forth names, symbols and the like; its only usefulness lies in its presentation of facts which anyone might have learned by repeating the compilers' industry, and which, having learned, he could present to the public practically in only the one way. The former is the product of intellectual labor and literary skill, results of which are unique each time the subject is handled independently, even though the same materials are dealt with. Again, the directory or list is intended to be used as a guide to something further and different; it is not itself a contribution to knowledge; which is to be availed of by co-workers in the same field; greater latitude is to be expected in the cases of authors consulting other textbooks or using directories and lists than in the case of one compiler attempting to make use of another similar compilation (8).

The relationship of the nature of the use to the degree to which copyrighted material is protected will be treated further under "Fair Use."

Summary

1. Copyright protection is offered primarily to a work as a whole.
2. Only "writings" of "authors" are eligible for copyright protection.
3. Only writings which have been created by the skill, labor and/or judgment of an author may be copyrighted.
4. The degree of protection varies with the type of material involved, the nature of the work and the nature and purposes of the use which may be made of it.
5. An article in a composite work or a periodical or a newspaper may or may not be protected by the copyright of the work as a whole.

CHAPTER VIII

Who May Obtain Copyright?

As noted above, the Constitution authorizes protection of "authors." The Congress does not, therefore, have authority to pass a law giving copyright privileges to others than "authors." Yet, the Copyright Act, Section 9, provides that the author or proprietor of any work made the subject of copyright shall have copyright for such work under the conditions and for the terms specified.

It is apparent that the Congress intended its grant to "proprietors" merely as a means for making the grant to authors effective. The author rarely publishes his writings. He must generally use established publishing channels. If he could not transfer a valid right to the publisher, he would, in effect, lose the protection which the act is intended to provide; and inclusion of publishers (or proprietors) in the act is merely the inclusion by name of one type of "assign," rather than the provision of copyright to publishers as such. There is no authority for the latter course; and, if the Act attempted such a course, it would appear to exceed its constitutional authority.

Only the author or his assign may obtain copyright; and, when a party comes into a court seeking protection of a copyright, he must show that he is the author of the work, or that his title is derived from one sustaining that relation to the publication (87). Congress is not vested by the Constitution with the power to grant a copyright to a mere owner of a work as such, to a "proprietor" in that sense only, without any express or implied transfer from the author or inventor of his right to a copyright (195). The right of any other person than the author or inventor must, therefore, be a purely secondary and derivative one, and in enforcing any alleged copyright such a person must show an exclusive right lawfully derived from the author (195).

Under the present act, even more strongly than heretofore, the complainant in a copyright suit must show his title not merely by allegation that he is the proprietor, but by setting forth facts which show how he became proprietor (54). No power exists in an "agent" or licensee to copyright anything; that privilege is reserved to

"authors or proprietors" (163, 142, 143), and a contract permitting one to publish or to make copies does not convey the literary property (143, 71). Even when the assignee owns ninety-five per cent of the stock of the corporation which claims copyright, that does not make the corporation the "proprietor" (144), and illustrations by another are not the literary property of the author and are not, therefore, covered by the author's copyright (88) unless by assignment the author of the book has become proprietor of its illustrations.

In pleading a case of infringement, the plaintiff must show title, not merely by broad allegation of proprietorship, but by setting forth facts which indicate how he became proprietor. A mere licensee is not a proprietor and has no right to take out a copyright (88), and a proprietor must trace his title from the author. While the Copyright Act should be liberally construed with a view to protecting the just rights of authors, to encourage the development of literature and art, the complainant should show that the person in whose name the copyright was obtained was the rightful owner (74, 32, 148).

Oliver v. Saint Germain (132) contributes an interesting variant on this theme. In this case the author claimed in the preface to his book that he had not written the book, but that it was a revelation from spirits, and the Court did not permit him "to change his position for profit in a law suit." The case was dismissed on the ground that one who is not the author may not obtain copyright.

Despite the many decisions indicating clearly that the manuscript and the literary property are distinct and separate entities, and that transfer of the one does not convey the other, the Second Circuit Court of Appeals said in 1927 in *Gerlach v. Morris* (228), "Possession of a chattel is *prima facie* evidence of title," and in 1942 it was stated in *Freundlich v. Hebrew Publishing Company* (227), "The certificate is *prima facie* evidence that the plaintiff is the proprietor and has title to the copyright."

If either of the above points of view is correct, then very many decisions to the contrary are wrong and should be reversed. It is especially difficult to see any logical basis for the statement re *Freundlich* in view of the fact that the Register of Copyrights makes no investigation of the status in relationship to the literary property of anyone who applies for a certificate! Furthermore, these decisions would appear to indicate that any person applying for copyright is

automatically to be considered, at least *prima facie*, to be the "author"—by virtue of his application for copyright.

Beneficial interest.—There has been a tendency in a few cases to determine that the publisher (who is not the proprietor in these cases) may obtain copyright and hold it in trust for the author, who is the rightful owner, unless the owner has indicated in some way that he did not authorize the publisher to do so (57, 44, 78). However, the Supreme Court considered this point and required positive approval by the author, rather than assuming that silence gives consent (121, 58, 45, 145, 170).

In view of the fact that the author has a right to choose whether he will copyright his work or dedicate it to the public, it would appear difficult to justify the contention that sending a manuscript to a publisher without reservation necessarily infers a transfer of the right to obtain copyright. It might with equal force infer transfer (if it infers anything) of the right to dedicate the "writing" to the public. It cannot be doubted that the copyright owner who might elect to publish without any copyright notice and thereby forego whatever protection that would give could also authorize another so to publish (176).

There have been many decisions indicating that assignment of the literary property, or the right to obtain copyright, may not be inferred. It has been observed that in making a mere contract for printing and publishing a work, it is not usual to say anything about the copyright. That is ordinarily retained by the author, unless there be an agreement or understanding that the name of the publisher shall be used for that purpose (145).

The property in the copyright is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer (167). Nor does the rule that he who grants a thing, grants impliedly what is essential to the beneficial use of that thing, apply to this case. A press, and paper, and ink, are essential to the beneficial use of a copperplate. But it would hardly be contended that the sale of a copperplate passed a press, and paper, and ink, as incidents of the plate, because necessary to its enjoyment. The sale of a copperplate passes the right to such lawful use thereof as the purchaser can make, by reason of the ownership of the thing he has bought; but not the right to a use thereof,

by reason of the ownership of something else which he has not bought, and which belongs to a third person. If he has not acquired a press, or paper, or ink, he cannot use his plate for printing, because each of these kinds of property is necessary to enable him to use it for that purpose. So, if he has not acquired the right to print, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper and ink, or as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the limited time, during which the exclusive right exists shall have expired, and then use it to print maps. He may sell it to another, who has the right to print and publish, but he can no more use that right of property than he can use a press or paper, which belongs to a third person (167).

It appears clear that the title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. If no such contract is proved, then the most that could possibly be said, in regard to the right of a licensee is that the arrangement entitled them to have it performed or to print and publish it. There is not the slightest foundation upon which they can rest a claim to the literary property in the manuscript, (31) and, although the work may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced. A mere contract authorizing the publication of a story in a magazine does not imply sale of the copyright (121, 145).

It would appear, therefore, that the general position of the courts has been that transfer of title in the form of a full assignment rather than a license or limited transfer is essential if anyone other than the author is to receive benefit of copyright, and that such a transfer may not be inferred from permission to publish.

The significance of this point in relation to the vast mass of scholarly periodical literature is almost revolutionary. Under this principle the vast majority of scholarly contributions to periodicals have never been copyrighted and are in the public domain.

To be sure, the periodical issues themselves may, in most cases, adequately be protected. But it is clear that the copyright of the

issue as a whole does not extend to individual articles which have not been assigned to the proprietor of the copyright of the issue.

It is not the general practice for scholars to make assignment of the literary property when they send articles to journals, and lacking a clearly specified transfer of the literary property, permission to print is not the same as permission to copyright. The author has the right to publish without copyright, thus dedicating his work to the public, and may authorize another to make the dedicating publication. Authority to publish for the first time is authority only to end the common law literary property.

Discussion with many authors indicates that they exceedingly rarely authorize publishers of periodicals to obtain the copyright for such articles—which alone would authorize control over the manuscript after it has once been published to the world.

It is probable, therefore, that the great bulk of scholarly periodical articles—but not the periodical issues—are in the public domain.

Summary

1. Only the author or proprietor (i.e., someone who can demonstrate that the literary property has been transferred to him by the author) may obtain copyright.

2. The right of a publisher to obtain a valid copyright depends upon his ability to demonstrate that ownership of the literary property has been transferred to him.

3. A mere allegation that one not the author is the "proprietor" is insufficient to make him eligible to obtain copyright.

4. An "agent" cannot obtain copyright.

5. A "licensee" cannot obtain copyright.

6. Most scholarly periodical articles are probably public property.

CHAPTER IX

How Is Copyright Obtained?

There appears to be little doubt that the method of obtaining copyright is by publication with notice of copyright. There is no other requirement except that the notice be in the form prescribed by law and in the location required by statute. To be sure, the owner of a copyright so obtained cannot enforce his right in court until after he has made deposit of copies as required by law, but the copyright goes into effect, or at least the period of duration of the copyright starts, from the time of general publication with proper notice of copyright in the prescribed form.

As stated in Section 10 of the Act,

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and the notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor . . .

Based on this statement, it has been held that the essence of copyright is publication with notice of copyright (58, 187). Simple as this conclusion seems, however, it should be noted that one may print a notice in the proper form and place, as required by statute, yet fail to get a valid copyright thereby.

For one thing, *publication* is required, and, if a general publication is not made there is no valid copyright. Furthermore, the opening phrase of paragraph 10 of the Act, "any person entitled thereto by this title . . ." means anyone who has complied with all the other requirements of the title—including the requirement that mechanical work be performed in the United States, etc. Thus, regardless of compliance with any one requirement of the statute, failure to comply with any pertinent statutory requirement defeats copyright.

The public purpose in requiring publication of notice of copyrighting is to prevent innocent persons from suffering the penalty of the statute for reproduction of the copyrighted article (165). This point of view is also expressed explicitly in the principle that an author cannot copyright a play under one title, produce it under

another, and hold as an infringer a person who has been misled by his action (219).

Before the enactment of the Act of 1909, copying from a copyrighted work from which the copyright notice had inadvertently been omitted was a violation of copyright, suffering full penalties (47). To correct this situation in terms of the objective of notice, the Congress revised this provision in enacting the law of 1909, to protect the innocent infringer from unfair penalties caused by inadvertent omission of notice, providing, in Section 21,

Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright . . . but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

An illegible notice does not comply with the requirement of the statute (4), and publication of the copyright notice in any location other than those specified by the statute is insufficient notice and defeats copyright (182). This indicates again that the primary purpose of notice is to warn the public of copyright so as to prevent injury to an innocent user, and this philosophy may partially explain the difference in point of view of the United States practice and the practice of certain foreign countries which provides for automatic copyright.

It should also be noted that Section 10 of the Act requires notice in every copy! This means, as shown below, that, except for inadvertent omission in one or a few copies, failure to include the notice in any reprinting voids the copyright. Thus, it would appear that the widespread practice of providing reprints of scientific articles without notice of copyright must void their copyrights, if, indeed, valid copyrights ever did exist.

In this respect, the Supreme Court said in *Mifflin v. Dutton* (120),

As the first twenty-nine chapters of "The Minister's Wooing" appeared in the *Atlantic Monthly* before any steps were taken, either by the publishers or by Mrs. Stowe, to obtain a copyright, it follows that they, at least have become public property.

Mrs. Stowe's copyright of the last thirteen chapters would doubtless have been valid but for the fact that they subsequently appeared in the November and December numbers of the *Atlantic Monthly* without notice of such copyright. As we have already held that the copyright of the *Atlantic Monthly* by Ticknor & Fields did not operate as notice of the right of the author to any article therein appearing, it follows from the case just decided that the appearance of the last thirteen chapters in the *Atlantic Monthly* vitiated the copyright.

Many other cases illustrate the requirement that every copy of a copyrighted work must bear the notice required by statute (60). If the author fails to give the proper notice, the copyright never becomes effective; or, if he fails to repeat the notice when the copyrighted matter is republished, the copyright is lost (149, 62, 63, 162).

While many cases and some current practice fail to take into consideration the principle stated by the Supreme Court (120), it has been followed in a number of cases. For example, in 1938, the Seventh Circuit Court of Appeals said in *McDaniel v. Freedman* (111) that republication of a copyrighted magazine article without notice of the author's copyright in his book voided his copyright. The court said,

The court found that the subject matter of the appellant's two copyrighted works was substantially reproduced in an article subsequently written by him and published with his consent in the December, 1933, issue of the *Dental Digest*, a magazine of wide circulation. This publication bore no notice of appellant's copyright . . .

A perusal of this record convinces us that the court's findings and conclusions with respect to the copyright are supported by the weight of the evidence . . . It is quite true that section 20 of the Copyright Act provides that accidental omissions of copyright notice do not affect a previously acquired copyright except as to a person misled thereby. However this record does not disclose that the omission here was accidental. On the contrary the disclosure, without notice of appellant's copyright, was published in one of the leading dental publications of America, which had an extensive circulation among the dental profession generally.

Many copyrighted works contain statements in addition to the words required for compliance with the statute. While such statements are interesting in that they indicate what the publisher may think the rights of the copyright proprietor may be, they do not en-

large the coverage granted by the Statute. Section 19 of the Copyright Act requires,

The notice of copyright required by Section 10 of this title shall consist either of the word "copyright" or the abbreviation "copr." accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical or dramatic work, the notice shall include also the year in which the copyright was secured by publication . . .

If the notice required by statute is given, no other notice is necessary; if the notice required by statute is not given, then the other statements are of no significance in securing copyright.

While the wording of these supplementary notices varies widely, only a few examples will be cited to show that such statements may be confusing and, whether wilfully or not, may be misleading.

Examine, for example, Mr. Ansel Adams' work, *Making a Photograph*, which was published in London and New York by Studio Publications in 1948. It states, where the notice should be,

This book is copyright. It may not be reproduced in whole or in part in any form without permission. Applications should be addressed to the publisher.

Perhaps this book is copyrighted in England, but, in view of the fact that it does not give the required statutory notice, it is not copyrighted in the United States.

Or, take Miss Leslie Ford's *Date With Death*, published in 1949 by Scribners. It says,

Copyright, 1949 by Leslie Ford.

Copyright, 1949, by The Curtis Publishing Co.

All rights reserved. No part of this book may be reproduced in any form without the permission of Charles Scribner's Sons.

Can there be three different copyrights for one mystery story? Unless the copyright was transferred to Charles Scribner's Sons and the transfer registered in the Copyright Office within three months of publication (see Sections 28 and 30 of the Act), Charles Scribner's Sons would appear to have no rights in the matter at all, and to be lacking in authority either to permit or to deny copying, except, possibly, as agents for Miss Ford. If the rights were transferred to Charles Scribner's Sons at the time of publication, there would appear to be little point in having claims to copyright by Miss Ford and the Curtis Publishing Company printed in the book, since, if they had had a legal claim—which would be an interesting problem for the courts—they would have assigned it to Charles Scribner's

Sons and would have had it no more at the time the three claims were printed. The copyright situation would, in this case, appear to be somewhat confused.¹

Now look at Pamela Hinkson's *Golden Rose*, published by Knopf, in 1944. It states,

Copyright 1944 by Pamela Hinkson.

All rights reserved. No part of this book may be reproduced in any form without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review to be printed in a magazine or newspaper.

In view of the fact that the courts have recognized the right of reviewers to make reasonable quotations (without limiting the medium in which the review is to be carried), this does not add anything to the privilege of reviewers. Since the publishers state, on the same page, that they are not the owners of the copyright but that it belongs to Pamela Hinkson, they would appear to have no right to require that anyone ask their permission or to grant such permission in their own name.

A somewhat different case is presented by the *Piazza Tales* by Herman Melville, edited by Egbert S. Oliver and published by Hendricks House-Farrar, Straus, Incorporated. The notice in this case is as follows,

Copyright, 1948 by H.F.S. and Co., Inc. All rights reserved.

No part of the copyrighted material in this book may be reproduced in any form, by mimeograph or by any other means, without written permission from the publisher.

The statement is forthright and truthful. But what does it mean? Aside from the arrangement of the book as a whole, which is no doubt copyrightable, the "copyrighted material in this book" consists of about twelve pages of prefatory material (including the half-title and title page) and some twenty-six pages of "Explanatory Notes" (pages 225-250), plus, possibly, the running heads. Pages 1 through 223 are a reprinting of six stories by Herman Melville, all published between 1853 and 1856, and thus obviously in the public domain. Would the above notice convey these facts to the average scholar?

A simpler case is typified in Martha Ostenso's *Milk Route*, published by Dodd-Mead in 1948. In this case the notice is,

¹It is a pretty fair mystery (author).

Copyright, 1948, by Dodd-Mead and Company, Inc. All rights reserved. No part of this book may be reproduced in any form without permission in writing from the publisher.

In view of court holdings that novels are not protected against mechanical recording, such statements as the above may be misleading.

A somewhat more useful type of added notes is found in Arthur Miller's *Death of a Salesman*. It states,

Copyright 1949 by Arthur Miller.

This play in its printed form is designed for the reading public only. All dramatic rights in it are fully protected by copyrights . . . Anyone disregarding the author's rights renders himself liable to prosecution. Communications should be addressed to the author's representative, MCA Management Ltd. . . .

In this case, the last sentence tells where to write for permission, but the rest of the statement would appear to add little to the proper statutory notice, which appears in the book.

One more useful type of note should be recorded. Many periodicals indicate that a reasonable amount of quotation is permitted. Such a note, while generally adding little to the rights of users, does indicate recognition of these rights by the copyright proprietor.

The examples cited were merely a group of books that happened to be at hand at the time this section was prepared. Many other examples may readily be found. They serve to indicate that most notices added to the statutory notice do not add anything to the copyright owner's protection and may confuse or mislead the public.

Summary

1. Copyright depends upon publication with proper notice in the location specified by the statute.

2. Every printing of a copyrighted work must bear the same copyright notice—failure to include the proper notice on a reprinting of any part of a copyrighted work, either before or after copyrighting, defeats the copyright for the part so published.

3. The primary purpose of the notice is to protect the public against innocently infringing copyrighted materials.

4. Addition of other statements to the required statutory notice adds nothing to the protection afforded by the act; such statements are frequently confusing and are often misleading. Such additional statements would appear to serve useful purposes only when they indicate what the copyright proprietor considers to be fair use or when they indicate the address of the copyright owner or his agent.

CHAPTER X

Fair Use

The very purpose for which statutory copyright is granted requires that the public be permitted to make any and all uses of the copyright material, except for the limited monopoly granted to the author, for a limited time, to publish, vend, etc.

"Fair use" is not, as it has been termed by some, a form of infringement which has been condoned. Permission to use copyrighted material in all ways which do not interfere with the limited monopoly granted to the author is inherent in the Copyright Law and constitutes the justification for statutory copyright.

As noted in the treatment of "copying," some transcribing of copyrighted materials is not considered "copying" under either the common law or statutory copyright. The Doctrine of Fair Use, however, applies when there has been what, in legal parlance would be termed "copying" or "publishing." Since common law literary property is the right of first publication, there can be no "fair use" of unpublished material, and the doctrine of fair use never applies to unpublished works protected by common law.

Fair use may be defined as the type of partial copying or publishing of works protected by statutory copyright, which is not infringement because it is essential if the public is to obtain any benefit from granting a monopoly to authors.

The difference between "infringement" and "fair use" is a matter of purpose, degree and effect of the copying, rather than copying or publishing as such. The differentiation between fair use and infringement is fundamentally a problem of balancing what the author must dedicate to society in return for his statutory copyright—which varies according to the nature of the works involved—against undue appropriation of what society has promised the author in terms of protection of his exclusive right to make merchandise of the product of his intellectual work. In its simplest terms, then, infringement is unfair use rather than any use at all, and fair use is all use dedicated to the public by the nature of statutory copyright. The difficulty lies in the fact that the differentiation between fair and unfair use rests upon the interplay of many complex variable factors.

More than one hundred years ago it was held that quoting the exact text of a copyrighted work for the purpose of criticism is fair use (24), and that the question of piracy often depends upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent and value of the materials thus used; the objects of each work. In short, we must often, in deciding a question of this sort, look to the nature and objects of the selection made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into discussion of such questions. In some cases, a considerable portion of materials of the original work may be fused into another work so as to be indistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot be treated as a piracy (79, 87, 76, 153, 117, 162).

The case of *Folsom v. Marsh* (79) is very important in that it outlines the elements which have generally been considered by all courts since that time, in differentiating between fair use and unfair use. These may be charted as follows:

Criteria	Fair Use	Unfair Use or Infringement
Value of Material copied	"Relatively" little	"Relatively" much
Object of works -----	Different	Same
Quantity -----	"Relatively" little	"Relatively" much
Effect on sale -----	None or increases	Diminishes
Effect on profits -----	None or increases	Diminishes
Supersedes original -----	No	Yes
Motive -----	Good	Bad

"Fair use" of technical and scientific works receives broader and more liberal interpretation when the purpose of the borrowing is the acquisition of knowledge by a student, the application of the appropriated material in the practice of an art or profession, or use in publications serving a different rather than a competing purpose (16). The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge it contains; and, where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, such methods and diagrams

are to be considered as necessary incidents to the art and given therewith to the public (16, 55, 76).

The public are entitled to make any use of a copyrighted book which does not amount to a violation of the exclusive right given by the statute. Anything less than a substantial copy of the whole or a material part of the book does not violate the exclusive right given by statute. Hence, anyone may copy less than a material part of a copyright book; i.e. he may make a fair use of it. Several classes of cases of copying have been held to be fair and hence not an infringement. Perhaps others will be recognized when they arise. Each case depends upon the particular circumstances. All uses of a book are dedicated to the public by publication, except such as are reserved by the statutes. The owner of a copyright is not entitled to equitable relief against another publication solely because the writer of that other publication may have saved a certain amount of stenographic labor, or of manual writing, by cutting or copying the words of the citations. The necessary advance in any science, and the very purpose for which text books and legal publications are prepared, contemplates, to a certain extent, the dissemination of knowledge and improvement in the literature of the science, which is open to a subsequent writer as much as to a lawyer or judge, who is earning his living partly by the use of copyrighted books. The words "unfair use," while having a broader meaning with respect to the appropriation of earlier writings by a work covering substantially the same ground, and supplanting the earlier book, than they have in the acquirement of knowledge upon the part of a student in the field treated by the publication, cannot, nevertheless, be arbitrarily made to an equivalent to no use at all, outside of consultation. Such construction would mean that a later work would be no advance upon the earlier work, unless the writer had superior training or greater ability in doing the same thing in which the earlier writer had attempted, and the improvement and advancement in the science itself would thus be sacrificed, and the writers of books would be deprived of the proper growth in knowledge, and from taking advantage of the position to which the earlier writers had carried the science under consideration (189, 190, 92, 11).

If an author by originating a new arrangement and form of expression of certain ideas or conceptions could withdraw these ideas or conceptions from the stock of materials to be used by other authors,

each copyright would narrow the field of thought open for development and exploitation; and science, poetry, narrative and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted. There is an important distinction between copyrights and patents. Letters patent give a monopoly to make, vend, and use, while copyright does not give an exclusive right to use. Copyright protection is extended to authors mainly with a view to inducing them to give their ideas to the public so that they may be added to the intellectual store, accessible to the people, and that they may be used for the intellectual advancement of mankind (72, 97, 8, 12, 134).

Probably the simplest definition of fair use is that fair use is "one that is reasonable and customary" (156). Under this construction the Doctrine of Fair Use does not apply to commercial uses such as advertising a product (95).

Incidental, fragmentary publication of the chorus of a song in a magazine article about the subject of the song is a fair use because it does not impair the value of the copyrighted song, or replace it, nor does it in any way harm or seriously affect the distribution of the song (33).

One of the decisions which, if followed generally, might broaden the concept of fair use, was handed down by Judge Clancy in the District Court, Southern District, New York in 1941. In this case, *American Institute of Architects v. Fenichel* (6), Mr. Fenichel, admitting the validity of the plaintiff's copyright in their book of forms, made and used six copies of one form and delivered them to the owner and contractors with whom he was dealing. Since the forms were intended for use in actual practice, the Judge ruled, "Delivery of copies here was publication of a kind but we can see in it no derogation of the plaintiff's copyright." This is not a new position except that here, despite production of multiple copies of the complete forms, a copying if anything is a copying, the Judge went further in interpreting the intent of the statute to say, "It is sufficient for the decision of this case to hold as we do that the defendant's use was not the kind of use intended to be forbidden by the statute and does not constitute an infringement."

Even under an expanded doctrine of "unfair use" it is necessary to consider the comparative objects of the respective publications. When they have nothing whatever in common, the defendant is in

no sense competing with the plaintiff either by prejudicing the sale, diminishing the profits or superseding the objects of the original work. In fact, in certain cases, it would almost seem as though the plaintiff's books were intended to be used in some manner similar to that in which a defendant has used them. They are not literary productions to be read as a whole, but serve to place interesting facts in the hands of people who want to know about them or have some use to which they can put them. Of course, the plaintiff does not "own" the facts themselves, but, on no other theory, could he restrain the use which the defendant is making of them (100).

A case of alleged piracy of unpublished, uncopyrighted material is the same as a case of alleged piracy of copyrighted material. The test for determining whether there is piracy is the same in both cases. The only distinction between the two classes of cases is that the law permits "fair use" of copyrighted material. It does not permit "fair use" of unpublished, uncopyrighted material (86).

For other cases, indicating acceptance of the principle of Fair Use as a use which does not materially reduce the demand for the original or injuriously affect the rights of the copyright owner to a substantial extent, see also: *Ansell v. Puritan Co.*, 61 F2 131; *Bloom v. Hamlin*, 125 F. 977; *Boosey v. Empire*, 224 F. 646; *Carr v. National Capital Press*, 71 F2 220; *Chicago Record v. Tribune*, 275 F. 797; *Gray v. Russell*, 10 F. Cas. 1035; *Hill v. Whalen*, 220 F. 359; *Holt v. Liggett*, 23 F. Supp. 302; *Hutchins v. Shead*, Weekly Notes 20; *Johns v. Paull-Pioneer*, 102 F2 282; *Lawrence v. Dana*, F. Cas. No. 8136; *Lowenfels v. Nathan*, 2 F. Supp. 73; *Nichols v. Universal*, 45 F2 119; *Pike v. Nichols*, LR 5 Ch. App. Cases; *Remick v. General Electric*, 16 F2 829; *Rush v. Oursler*, 39 F2 468; *Scott v. Stanford*, LR 3 Equity Cases 718; *Witmark v. Pastime*, 298 F 470.

Summary

1. The doctrine of fair use provides that, since the purpose of publication is use and the purpose of copyright is dissemination and use, republication of copyrighted materials does not infringe unless so much be republished as to (a) reduce the demand for the original, (b) supersede its objects, (c) materially reduce its value, (d) compete with the copyrighted work in its own field, (e) diminish the author's profits, or (f) cause *substantial* injury to the proprietor.

2. Probably the best and simplest definition of fair use is, "one that is reasonable and customary."

CHAPTER XI

Other Rights of Users

In addition to the right of fair use, certain other rights of users of copyrighted materials have been recognized by the courts.

The right to use facts or ideas.—The most important right of users of copyright material is the right to make any use whatsoever of the ideas which they contain. Ideas are not protected by copyright! Thus, use of ideas expressed in copyrighted works is not an infringement, nor does it have to be justified by the doctrine of fair use. Ideas as such are outside the law, and their use is both legally and morally justified.

The right to make any use not reserved by law.—Unlike patents, copyright does not protect against use of the material for which copyright is granted. Rather, the user is free to make any use of copyrighted materials except those reserved to the copyright proprietor by the Copyright Act, and the only use prohibited is a use which amounts to a violation of the exclusive right given by the statute (189, 97). Since the property is affected with a public interest, the right of exclusion is qualified (97, 12).

The right to rebind and vend second-hand copies is another right of users of copyright materials. Even though the sale of second-hand copies is frequently unquestionably in direct competition with the right guaranteed the copyright owner by the Copyright Act "to vend" his protected work, it was clearly the intent of Congress that sale of secondhand copies should not be controlled by the copyright owner in any way (198). As stated by the Committee on Patents, 60th Congress, 2nd Session, in reporting the Act of 1909, "Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control over the article which is the subject of copyright after said proprietor has made the first sale."

In keeping with this statement of policy, the Act states (Title 17, Chapter 1, Section 27), ". . . nothing in this title shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Thus, in order "to promote the progress of science and the useful arts," and to encourage authors and publishers to develop their talents and to undergo the labor and expense of producing original works which will be of value because of the benefit and advantage thereby accruing to the people, the law has granted an exclusive proprietary right to authors and publishers to all such publications. In the assertion of this right they should, at all times, receive full and adequate assistance from the law. Out of these rights, however, and indeed in order to give them full expression, grow the rights of the purchasers of such publications. One of these rights is the right to resell a book when once purchased. This right should likewise be full and untrammelled. Another right incidental to it is the right to care for and keep in good condition the books thus purchased. This necessarily gives the right to renovate, clean, and rebind. What they can do for themselves they can rightfully secure the services of others to do for them. This in turn involves a right of another kind, which is to purchase second-hand books and to do with them what the original purchaser had the right to do, one of which things is the right to vend them without or after renovation. While it is doubtless true that the part of the purchasing public which is thus supplied with second-hand books is withdrawn from the market for the purchase of new publications, a publisher of books and a second-hand dealer in books (where there is no attempt to pass off the one for the other) cannot be said in any proper sense of the term to be in competition (84, 37).

The right to save mechanical labor, however, appears to depend upon the circumstances of the case. Perhaps the difference lies in whether merely mechanical labor is saved rather than intellectual labor. Thus, if a man should merely reproduce a part of a copyrighted work, thus saving himself the work of authorship, if he copies a material or substantial part of the copyrighted book, he is unquestionably competing unfairly with the copyright owner.

However, if instead of saving the intellectual work of authorship, the user merely saves himself mechanical labor incident to the creative work, his copying would appear to be quite legitimate. For example, in *West v. Thompson* (189, 190), it is stated,

It does not seem to the court that the owner of a copyright is entitled to equitable relief against another publication solely because the writer of that other publication may have saved a certain amount of stenographic labor, or of manual handwriting

by cutting or copying the words of the citations from the digests, where no literary ability is appropriated in the arrangement or collection of the cases themselves. So an encyclopedia writer, who has formulated a proposition of texts and directs his stenographer to add to that text the citations shown by all of the digests, would not be guilty of infringement, and would not thereby make himself liable to a decree in equity, if, after proper research and verification, he merely for convenience used the printed words in making up the article instead of having the stenographer rewrite the same at his dictation, with the original books in his hands when dictating, instead of having been examined and laid aside when the citation was found to be correct.

In the appeal of this case, in 1910 (190) the Second Circuit Court of Appeals went still further in this respect and included similar use of digests, saying, “. . . a digest considered by itself is nothing . . . judges . . . lawyers . . . and authors . . . may cut out parts of the digests to assist them in running down the cases and copy lists of cases from the digests . . .”

Users appear also to have a *right to use material for the purpose* for which it was published. The necessary advance in any science, and the very purpose for which textbooks and legal publications are prepared, contemplates, to a certain extent, the dissemination of knowledge and improvement in the literature of science, which is open to a subsequent writer as much as to a lawyer or judge, who is earning his living partly by the use of the copyrighted books (189). A poem or a novel or a history is intended to please, interest, instruct, or satisfy the reader, so to speak, in itself; but a digest considered by itself is nothing. Its purpose is as a tool to enable judges to write their opinions, lawyers to write their briefs, and authors to write their textbooks. (190, 6, 100).

Articles intended for practical use in connection with a machine are not copyrightable. Both law and policy forbid monopolizing a machine except within the comparatively narrow limits of the patent system. Since machines which operate according to charts are useless without these charts, to copyright the charts would in effect continue monopoly of a machine beyond the time authorized by the patent law (35).

Another right which the user appears to have is *the right to make extracts or a complete copy for his own use*. This will be discussed in the chapter on “copying.”

Still another right is *the right to use material in the public domain*. This right appears obvious—however, as noted under *Moral Rights*, there may be a conflict between the right of a user to make any use he pleases of a work in the public domain, and the author's alleged moral right to prevent damage to his reputation. However, to date the Moral Right has rarely been recognized by American courts.

The right to save mechanical labor has an interesting sidelight. Does the principle that what a man may do for himself he may hire an agent to do apply in this respect? It evidently does, for in *West v. Thompson* the District Court and the Second Circuit Court of Appeals both recognized the right of a user to have his secretary copy for him what he could legally copy for himself (189, 190). And, as stated in *Ginn v. Appollo* (84), in 1914, "What they can do for themselves they can rightfully secure the services of others to do for them."

As stated by the Supreme Court of Iowa, in *Burlington v. Prudential* (218 N.W. 949) in 1928, the elementary principle of agency is, "What one may do for himself he may do by another, and what he does by another he does himself."

If these two principles apply, and if, as noted in the chapter on "copying," making a copy for one's own use is not "copying" in the sense of the statute, then making of single extract copies for individual users at their request and order by libraries and others, would be quite outside the scope of the Copyright Act and would violate no rights or laws at all.

If these principles do not apply, then we would be in the position of asserting that what a man may legally do for himself, cannot be done for him by others under the Copyright Statute. This would mean that the statute would not affect the action so long as it was done in a manner wasteful of the scholar's time and energy, yet would apply and forbid the same act if done for him efficiently. In that case, the Copyright Act would appear to hinder rather than to promote the advancement of the sciences and useful arts and would have an effect diametrically opposed to its constitutional purpose.

As a matter of fact, it would appear that the former is true in practice. For at least forty years users have had agents make copies for them, and to date there is no record of a suit for violation of copyright. Some publishers' representatives have protested vigorously against this practice; others have refused to give permission to make

single copies for scholars of parts or all of their works, but with millions of pages so copied over the last thirty-five or forty years, there has been no challenge in the courts to the user's right to make an extract or copy for his own use, or to have such a copy made for him upon his specific request.

Summary

The rights of users, in addition to "fair use," include:

1. The right to use facts or ideas.
2. The right to make any use not specifically reserved to the copyright proprietor by law.
3. The right of access to copyrighted materials.
4. The right to rebind and to vend second-hand copies.
5. The right to save mechanical labor.
6. The right to use copyrighted materials for the purpose for which they were published.
7. The right to make a single copy of extracts or of the whole work for his own use, and probably the right to have another do that in his behalf.
8. The right freely to use material which is in the public domain.

CHAPTER XII

What Are "Writings" of "Authors"?

Author.—The common law literary property right and statutory copyright have both evolved around the philosophy that the creative work of authors merits protection in the public interest.

The Constitution authorized the Congress to grant monopolies to "authors" for their writings. Since the lay meanings and legal meanings of terms do not always coincide, it would be well to define these terms as they have been used in common law cases, in the Copyright Act and in court decisions on copyright. Unfortunately, there have been no adequate, authoritative, definitions of these words in relation to the objectives of the common law, the Constitution, or the Act.

The term "author" has been used generally in the sense of a creator of some concrete form of intellectual contribution. There has been little attempt to evaluate or grade the quality or importance of either the intellectual contribution or idea, as such, which is never protected, nor of the concrete form of presentation, which is the thing which both common law literary property and copyright attempt to protect.

Both common law and statute attempt to protect to the author (in varying degrees) that which he has created. They should not be, and generally are not, perverted to attempt to protect to an author that which is the creation of another. The concept expressed by the Supreme Court that the copyright on the issue of the journal protects the issue of the journal rather than the individual articles in it which are the creation of others (120, 121) is clarified by the above conception if we realize that there may be several creators involved, each of whom has the right to be protected in his own work and each of whom has the right to dedicate his own work to the public.

In addition to the individual author, the person who creates an article or a book, the law recognizes what, for lack of a better term, we might term the "corporate author."

When a work is performed for hire with the express understanding that the literary property is to be the property of the person

or body for whom the work is being done—rather than the property of the man or men who physically created it, the law recognizes the person for whom the work is done as the author. He is frequently termed the proprietor in decisions, but that confuses this “corporate author”—who is really responsible for the creation of the work—with a mere proprietor by virtue of an assignment of the literary property. The latter type of proprietor may or may not have a right to obtain a copyright—depending upon whether or not the courts find that a valid assignment of the literary property has been made. The former, who should be termed “corporate author” rather than proprietor, has actually created a particular concrete form; he is author of what he has created and is entitled to protection, both common law and statutory, for what he himself has created or has caused to be created. The Copyright Act states (Title 17, Chapter 1, Section 26), “. . . the word ‘author’ shall include an employer in the case of works made for hire.”

Thus, an issue or a volume of a periodical is a work of authorship as such. Its arrangement, selection of contributions, and its owners’ writings, such as the title page, running heads, etc., are all “writings” of the corporate author. The periodical as a whole merits protection regardless of the protection afforded to the articles in it—any or all of which may be in the public domain; or any or all of which may be the creation of other authors, protected by other copyrights.

Writings.—The various types of materials covered by both common law and by statute as “writings” indicate that that term has been interpreted in the broad sense of a presentation in any concrete form, rather than in the limited sense of alphabetical characters on paper.

The definition of “author” (whether corporate or individual) as one who has created something requiring intellectual work, and of “writings” as any concrete form of presentation of such creations, would clarify some of the points on which the various decisions of the courts appear to conflict.

For example, it has been held quite regularly that there may be but a single copyright on any one edition of a work. On the other hand, examples of multiple copyrights on one physical object abound. Most daily newspapers contain features which are copyrighted by

others. One issue may involve twenty copyrights in addition to the newspaper proprietor's copyright on the issue as a whole.

The difficulty appears to be that we have confused the work as a physical object, i.e., a thing which is sold as one block, with the word "work" which the courts frequently use as synonymous with writing—i.e., an intellectual unit. It is the latter which is attributable to an author, and, therefore, the writing or work as an intellectual unit is what may be protected by copyright.

On this basis an issue of a periodical as such is an intellectual contribution. It has the attributes of selection, arrangement, etc., which may be protected as the writings of a corporate author.

The articles contained in the periodical may be written under contract which transfers the literary property, in which case the corporate author of the periodical is their corporate creator and is entitled to obtain copyright.

Some articles may have been assigned to the periodical in which case the corporate author of the periodical is the "proprietor" in the sense of the Act, i.e., he has obtained from the author the literary property as well as permission to publish or dedicate the article, and is entitled to copyright it if he chooses to do so.

Some articles may have been sent to the periodical with permission to print, but without transfer of the literary property. These remain the literary property of the author and, if published without his own notice of copyright, would fall into the public domain; or, if published with notice of the author's copyright would be copyrighted by the author and not by the proprietor of the periodical.

Some of the articles may be reprinted from copyrighted sources. These should be protected by reproduction of the original copyright notice or they fall into the public domain.

And, finally, some of the articles may be in the public domain. Publication of these articles in a copyrighted work does not copyright the articles.

Under the concept of a "writing" or work as the concrete presentation of the literary work of an author, a composite work (which is an intellectual production) may have its own copyright as a whole, while each of its component parts may properly have a differing copyright status.

While this clarifies many decisions which would otherwise appear contradictory, it does point up another problem. Is the copy-

right granted for an issue of a periodical as a whole merely a right to deny permission to copy the composite work? If the proprietor of the copyright of an issue is not proprietor of certain articles in it but is merely a licensee permitted to publish those articles in his journal, can he give permission to reproduce the issue as a whole?

Whether it is necessary or not, many persons ask the copyright owners of newspapers or other composite works for permission to copy, and such permission is commonly granted. Does this permission protect the user from a suit by the owner of a valid copyright on one of its component parts? This issue appears never to have been settled by the courts, although they have generally ruled that copyright of the composite work as a whole does not change the copyright status of each of its component parts—except for those of which the copyright owner is author or proprietor. This last class would, according to decisions, be copyrighted also by the copyright of the work as a whole, just as if each such part bore a separate notice.

Even some professional periodicals carry advertisements which are copyrighted by the advertiser, so the problem of who can grant permission to copy a composite work is of frequent occurrence, and the strong insistence of some journal publishers that no copying of any part of their copyrighted work is permitted would appear to go beyond their right under the law either to permit or to deny the privilege.

As one indication of the extent of this problem, the May, 1949 issue of *Hygeia*, picked at random, contains on its sixty-four pages eight different notices of copyright, as follows:

1. On p. 296, the "title page" of the issue, the issue is copyrighted by the notice, "Copyright 1949, American Medical Association."
2. The page opposite the inside front cover bears the notice, "Copyright 1949 by Mead Johnson & Company."
3. The page opposite page 295 says "Copyright 1949, Mead Johnson & Company, Evansville, Ind., U.S.A."
4. Page 297 states on an illustration, "Copr. 1948 by Weco Products Company."
5. Part of page 302 states, "Copyright 1949—Metropolitan Life Insurance Company."
6. Page 303 says, "Copyright 1949, The Coca Cola Company."
7. Page 305 is, "Copyright 1949, General Mills, Inc."
8. The illustration in the Babee-Tenda Corporation advertisement (approximately six per cent of page 360) bears the notice "© 1949."

The solution appears simple. If the copyright be restricted to each "writing" of an "author" as above defined, and if each separate writing of an author were required to carry the proper notice as required by law, then all this confusion might be eliminated by a decision that the licensee may authorize others to do what he himself is licensed to do—i.e., if the periodical is copyrighted as a whole, and the proprietor has been licensed by others to include their properly marked copyrighted works therein, he should, as part of his contract, be able to authorize others to copy the whole issue, even though he could not authorize the reprinting of any single article which is the literary property of a different copyright owner. If he cannot do that, then his copyright would be a purely negative right—the right to deny use, and its value in promoting advancement of the sciences and useful arts would be open to question. If the rights of a corporate author do not include the right to permit copying of the whole of the work for which he has the copyright, that would appear to reduce the value of his property in much the same way, but probably not to the same extent, as would be the case of the individual author if he were deprived of the right of making a valid, commercially valuable assignment of his literary property.

Clarification of the relative rights of joint "authors" in "writings" involved in composite works would appear to be of great importance—both in determining what grant of monopoly copyright makes to whom, and in reducing the waste of effort and delays occasioned for scholars by the uncertainties in this area.

Summary

1. "Author" may be defined as "the creator of an intellectual contribution in some concrete form."
2. "Corporate author" is one who effects a work of authorship by contracting with another to perform the actual writing, or who creates a work of authorship through an individual or group working under direction in such a manner as to make the "writing" which results the literary property of the person who has paid to have the work done.
3. "Writings" may be defined as presentation in any concrete form.
4. The principle that what one may do for himself he may have an agent do for him, which is of great importance to users, is

important to the right of the owner of the copyright in composite works to license reproduction of his composite work.

5. If copyright should be granted only to "authors" or "corporate authors" as above defined, and the copyright should be granted to each only for his own "writings" as above defined, much of the confusion about common law literary property rights and copyright would vanish. Assignment or licensing would still be made by agreement, as now, but that would merely be an exercise of the author's rights under his statutory rights.

CHAPTER XIII

Public Domain

Publications are not always protected by common law property rights or statutory copyright. Many publications are dedicated to public use by their authors. Others are abandoned by their authors. Many have enjoyed the monopoly guaranteed by the act for the period specified by the act and are now open to any kind of use. Some other publications have lost their common law protection by general publication but have not secured statutory copyright because of failure to comply with the statute.

In order to understand the implications of copyright, it is necessary to determine just what is not covered by either common law protection or statutory copyright, and how publications or manuscripts may come into the public domain.

When a literary proprietor has made an unrestricted publication in any mode, other persons acquire unlimited rights of republishing in any mode in which his publication may enable them to exercise such a right unless statutory copyright has been obtained. (135, 56, 29, 30, 5, 13, 20, 28, 88, 62, 9, 137, 192, 2, 175, 124.)

Compliance with every requirement of the statute is essential to effecting a valid statutory copyright and failure to comply with the statute places the work in the public domain upon publication (40, 90, 94, 120, 121, 17, 149, 60, 183, 49, 182, 185, 188, 111, 62, 105, 4).

Despite all the decisions noted above, however, a District Court in *Cohen v. Etchison* (52), in 1915, contrary to practically all other decisions on this subject, said, "The judgment of the court is that the notice published in 'Men's Wear' was so defective in the respects indicated as not to convey to any one the existence of a copyright, and its conclusion upon the whole case is that the complainant had a valid copyright . . ."

The court, however, awarded no damages, saying, "... by reason of the improper and defective publication in 'Men's Wear,' from which the defendant copied the same, no damages will be awarded against them . . ."

Pirated material is not entitled to have copyright protection (178).

If no copyright at all, or—what comes to the same thing—no valid copyright has been obtained, the author has no exclusive right in the product of his artistic skill, and to copy is therefore not to compete unfairly in a legal sense, but to compete with full sanction of the law (17).

News may not be copyrighted (59), and official publications cannot afterwards be taken from the public under the guise of copyright (68).

When a book or drama is dedicated to the public, any one may prepare and copyright a motion picture photoplay founded thereon; but such copyright will not give the owner thereof an exclusive right to the motion picture rights in the book or drama (133).

Since the act declares that protection is extended to "all copyrightable component parts of the work copyrighted," the inference is that there may be in that for which claim is made much to which the protection of the act cannot extend (70). It is necessary, therefore, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it (5).

All kinds of use except the particular kind of use stated in the statute for the type of material concerned are dedicated to the public by publication (106).

A copyright obtained by a licensee is not valid. As licensees are not assigns, they are not proprietors and, therefore, cannot copyright the individual writing contained in their compilation when they copyright their compilation (71), and a composer who allowed others to use his song in a copyrighted compilation could not later assign copyright because the song was in the public domain. It cannot be doubted that the copyright owner who might elect to publish without any copyright notice and thereby foregoes whatever protection that would give could also authorize the defendant so to publish (176).

The rule of dedication and abandonment has been applied to abstract books and records. When the owner furnishes an abstract of title to the general public by filing a copy for record, this amounts to a publication and deprives him of the exclusive right thereafter to multiply copies thereof, or to prevent others from doing so (155).

Summary

1. Many types of publications are public property. Such publications are not protected either by common law or by statute. They are free for any use, including republication for profit.

2. If no statutory copyright has been obtained (or no valid statutory copyright—which is the same thing), a general publication places the work in the public domain.

3. The author has the right to dedicate his writings to the public if he wishes to do so.

4. No one other than an author (or someone whom he has authorized to do so) has the power either to put the work into the public domain or to obtain a valid copyright.

5. The author may dedicate his work to the public by (a) publishing it in any manner, such as placing it in a public office or public place, or by printing and selling copies without the notice, (b) by pirating a large part of his work, thus forfeiting the right to protection, or (c) by any act which clearly indicates abandonment of the common law right or the copyright.

6. In addition, of course, when the period of statutory protection has run out, the work becomes public property.

CHAPTER XIV

What Is Publication

The verb "to publish" is one of the most important words in the Copyright Act, for it is by "publication," that the common law right is ended and dedication to the public or statutory copyright is effected.

However, the term "publication," as used in copyright decisions may have any one of at least three completely different denotations.

The two legal denotations apply to the legal concept which involves an act terminating the common law right. The type of dissemination which has been held to terminate the common law literary property right should properly be called "a general publication." The type of dissemination which has been held not to terminate the common law right has been called "a limited publication" or "a restricted publication." This latter concept should probably not be called any kind of "publication" in the legal sense of an act which terminates the common law right, but should preferably be termed "limited communication" or "limited dissemination."

In addition, the courts frequently use the term "publication" in the lay sense, with no relationship to its effect upon the status of the common law or statutory protection—in this sense it refers primarily to the act of printing or reproducing and offering for sale.

It is important to note that the word "publish" as used in copyright decisions and in the Copyright Act is usually "general publication" rather than "limited publication."

Many of the difficulties in understanding what is meant by the word "publication" or more precisely "general publication" rise from the concept of "restricted publication." In some cases a literary work may be made available to every member of the public all over the world and yet be considered to have had only restricted publication. In other cases the exposure of a single copy of a manuscript where any member of the general public might have access to it, even though the work has not been printed, and even though there is no evidence that anyone has actually had access to it, and even though there is no evidence that the author meant to abandon it to the general public, has been ruled to constitute a general publication.

Public presentation of productions which are intended to be presented orally, such as sermons, lectures, dramatic and musical compositions and the like, has been considered to be "restricted publication" or "limited publication" and is not considered as being a "general publication which would give the public access to the work." (77)

General Publication

The Act provides to authors a limited monopoly, expressly stated in Article I, as follows (197): "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) to print, reprint, publish, copy, and vend the copyright work . . ."

It is true that the statute uses more words than "publish" to define copyright, including the words "copy, publish, print, complete, vend," and others; but they are all clearly intended to be covered by the word "publish" (6).

This decision would greatly simplify interpretation of the letter and spirit of the Copyright Act if we just knew with certainty what is meant by the verb "to publish." But on this crucial point, alas, the Copyright Act is silent. While the act does define "date of publication," the nature of publication must be interpreted from a long series of court decisions, made against varying mosaics.

The term "publication" is legally very old and of no one certain meaning. The thought, however, running through all the uses of the word, is an advising of the public, a making known of something to them for a purpose (115).

Since the concept is old, the courts have not generally repeated definitions of the term "publish"; nevertheless, a number of general definitions do occur. Thus, in 1879, in the case of *Gendell v. Orr* (83) it was stated,

To publish is to divulge, to utter, to proclaim, to make known to the public that which was before private or unknown . . . A dedication by the author to public use is not required to make the design public; any way by which the novelty or design is communicated or made known is a publication . . .

In this case it was held that "placing or erecting a design or work upon the highway, with an unrestricted view" was publication.

Delivery of copies to the Secretary of State has been held to constitute publication, even if the Secretary of State had not distributed any copies (108, 40); and, if a book is offered gratuitously

to the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher by that act, puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication is that it makes the writing available, "So that any person may have an opportunity of enjoying that for which copyright is intended to be secured." The present state of the law is that, if a book is put within reach of the general public so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common law copyright, or right of first publication, is gone (98, 183).

In line with this reasoning, depositing copies in the Office of the Librarian of Congress publishes the work deposited (98, 168, 123, 41, 13, 34).

The act of publication is the act of the author; and, when the latter has permitted the work to be filed in a public office, displays it in a state university, or leaves it in a hotel lobby where it is subject to being seen and read by any person, he has published his work to the world and can have no exclusive right in the design, or in its reproduction (65, 194, 42, 146).

In other words, a general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public (188, 124, 164).

A somewhat more common and less precise definition of publication is the sense of making public through printing or multiplication and distribution of copies (15).

Application for statutory copyright is, in effect a publication according to the Second Circuit Court of Appeals, which stated, "whoever elects to avail himself of the statute, however, must be held to have abandoned his common-law right." (139) Also application for letters patent publishes the application (104).

An absolute and unrestricted sale of a printed copy, especially where accompanied by filing similar copies with the Register, amounts to publication under the act (13), but printing alone is not publication. A book which has been printed but which has not yet been

offered or sold to the public is not "published," and it is still under the protection of the author's common law property right (27).

But as shown in *Kurfiss v. Cowherd* (107) a work need not even be committed to writing to be published. In this case permitting the public to inspect a house, with the architect's consent, was a general publication of his plans and his architectural plans were published and became public property, notwithstanding the fact that there was no showing that anyone had actually seen, or had received permission to examine the drawings concerned.

The simplest definition of publication located is "publication means to issue copies to the public." (6) However, in this case the court did not define the term "issue copies to the public," and, as will be noted below, there are varying degrees of "issuance."

Some material which is not copyrightable under the Statute may, nevertheless, be "published." For example, in the case of *Glazer v. Hoffman* (85) it was stated,

The record disclosed that Charles Hoffman, known as "Think-a-Drink Hoffman," acted and performed his sleight of hand tricks or stunts before many audiences since 1935. He is not protected by the terms and provisions of the Federal copyright statutes. On this record the conclusion is irresistible that these several acts and performances are not only a publication but a dedication to the public of the trick.

This case is particularly interesting because it is the only one located in the United States practice in which public performance is held to be a "general publication," rather than a "restricted publication."

This review of the decision of the courts as to the matter of "general publication" indicates that, if the Copyright Law considered only material printed and distributed as printed works (the word "printed" here being used to mean the mechanical multiplication of copies by letter press or other mechanical copying processes), there would be little difficulty in arriving at what the courts have meant by the word "publication." However, that is not the case, and the definition of "publication" is complicated by the concept of "limited publication" or "restricted publication."

The philosophy underlying the concept of limited publication as now applied to lectures, sermons, plays, etc., by American courts is probably best set forth in the case of *Ferris v. Frohman* (77). In this case the Supreme Court of Illinois held that the public presenta-

tion of a play was a publication, pointing out that under English law the performing right had no existence at common law and, therefore, a separate act had to be passed to protect the play right. The Supreme Court of Illinois said,

Copyright in a book or drama is the exclusive right of the owner to multiply and dispose of copies; this is where the drama is treated as a book. Playright is the exclusive right of public performance of the dramatic or musical composition. There is no reason why one should cease upon publication, or when devoted to unrestricted public use, and the other not.

However, the United States Supreme Court accepted federal jurisdiction in this case because a copyrighted work was involved in the conflict, and reversed this decision. The Supreme Court appears to have assumed that the copyright involved was valid. In view of the fact that the original play was not copyrighted in England when presented, the defendant alleged that it was in the public domain. But the United States Supreme Court said, "Performing right was not within the provisions of 8 Anne, c. 19, which gave to authors the sole liberty of printing their books." Thus the Supreme Court held, based on ancient English precedent, that since the playright was not protected by copyright until the play was issued in printed form, public performance was not made equivalent to a general publication. It is difficult to follow this reasoning. Acting a play before all the world does not, accordingly, make it available to be enjoyed by any member of the general public (i.e., is not a general publication), while posting a single copy of a playbill about that play on a telegraph pole in a small suburb is a publication of the playbill general enough to dedicate it to the public.

While the reasoning of the Supreme Court in determining the state of the law in this case is probably unassailable—that does not mean that the law makes sense. And so it is with many of the fine shades of interpretation which have developed around the common law and the statute.

Restricted Publication

The essence of the theory of restricted publication was stated in 1862 in the famous case of *Boucicault v. Fox* (31), as follows, "The true doctrine is, that the literary property in the manuscript continues in the author, so long as he exercises control over it, or has the right to control it . . . therefore, any special use of it by

him, in public, for his own benefit, is a use perfectly consistent with his exclusive right to its control, and is no evidence of abandonment."

Thus, there may be a limited publication by communication of the contents by reading, representation, or restricted private circulation which will not abridge the right of the author any further than necessarily results from the nature and extent of such limited use as he has made or allowed others to make of the manuscript or painting (135), and the courts have ruled that a professor lecturing to his class is not making a communication to the public at large. There are many types and cases of private disclosure, mostly drawn from English decisions, which have been used as precedent in our courts (38).

Prior to the first general publication the owner of the common law copyright has a perpetual right of property and may enjoy the benefit of a restricted publication without forfeiture of the right of general publication. Thus, he may communicate the contents of his work under restrictions without forfeiture of the right. This communication of contents under restriction, known as restricted or limited publication, is illustrated by lectures to classes of students, dramatic performances before a *select* audience, exhibitions of paintings in private galleries, private circulation of copies of manuscripts, etc. (1, 19, 38, 188), and at common law, the *public* performance of the play is not an abandonment of it to the public use (77, 124). A somewhat special case of limited distribution of a printed publication is that of *Schellberg v. Emphringham* (154) in which the Court held that the distribution of reprints of an article by a doctor, which are limited to his patients by way of instructing them in the treatments which he prescribed, was a limited distribution rather than a general publication.

In 1948 the Illinois Appellate Court in *Morton v. Raphael* (124) stated, "There is a logical distinction to be observed in dealing with the effect upon the authors' rights of the public performance of an unprinted drama and the publication of a printed book."

The most important element in a "limited publication" is that it "communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public." When a literary work is exhibited for a particular purpose, or to a limited number of persons, it does not thereby become *publici juris* and the author retains ownership of the work until he relinquishes it either by contract

or by an unequivocal act indicating an intent to dedicate it to the public (164).

It would appear from this review of court decisions that part of the difficulty in defining "publication" stems from the use of the term to mean "general publication" or "restricted publication," or just publication in the lay sense. Since the decisions indicate quite clearly that "restricted publication" or "limited publication" is related to common law rights rather than to statutory copyright, and since publication in the statutory sense of general publication cannot co-exist, it would probably be a step forward if limited or restricted publication be referred to as limited dissemination rather than publishing.

Usually, when the word "publication" is used without qualification, it refers to a "general publication," but that is not always the case. Much confusion might be avoided if the term "general publication" were used instead of the word "publication." If the term "general publication" were uniformly used to convey the idea of the kind of dissemination which terminates common law rights, and the term "limited dissemination" were used to indicate materials which are not affected by statutory copyright but rather are protected by common law right, that might remove confusion from other parts of the statute and its interpretation. Congress did not apparently intend to pass a law governing common law rights in literary property. Yet the statute and decisions under it do deal with materials not given general publication and with a number of aspects of limited dissemination.

Paragraph 9 of the Copyright Law states, "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title . . ."

This is the only means by which statutory copyright may be secured, except for the brief *ad interim* protection afforded to foreign publications, and the provision for copyright of unpublished materials of several categories in paragraph 11, which will be discussed below.

If there is no publication, and this unquestionably means "general publication," there can be no statutory copyright in the United States.

The court decisions noted above indicate that limited dissemination is not a publication such as would divest the object of its common law rights; it is not, therefore, a general publication—i.e., a publication in the sense of the act. Paragraph 2 of the act explicitly exempts

common law property from this act, stating, "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of such unpublished work without his consent and to obtain damages therefor."

Thus, if the courts are correct in saying that public presentation of a lecture or play is not such a general publication as would terminate common law rights, then the statute by its own terms would appear not to be concerned with such works and should not legislate with respect to works which have not been given general publication. There might be room for question as to the validity of Section 12, dealing with "Works not reproduced for sale" as well as with respect to protection of performing rights, etc. by statute save after a general publication has actually occurred, unless deposit with the Register of Copyrights is a general publication, as has generally been stated by the courts. In that case, Section 12 deals with books which have been given general publication and which have lost their common law protection. This is complicated, however, by the rules promulgated by the Register of Copyrights, which do not permit the use of such copies comparable to the use of copies which have been reproduced and distributed publicly, and thus, in effect, reduces these works to generally published materials which are not made generally available.

General publication is the legal concept relating to any act by which the "writing" in question is made accessible to one or more members of the general public by the author or with his permission.

Limited dissemination is the legal concept of limited use of a "writing" by its author, or with his authority, in any way which does not constitute a general publication or dedication.

In its original conception, "limited publication" involved very limited uses only and did not permit its distortion into a permanent unlimited monopoly to make money from public use—that is a strictly limited franchise, for a limited period, granted by copyright.

The original purpose of the concept of limited publication was sound and should serve a useful purpose. An author should be permitted to send his manuscript to several authorities for criticism without losing his common law right. Submitting a manuscript to a publisher, for acceptance or rejection, should not lose the right to monopoly.

Display of a painting for sale under conditions precluding copying should not be a general publication. However, when the painting is reproduced in a dealer's catalog, distributed to all, with no notice precluding copying, is that the same thing? The court so ruled in *Bell v. Catalde*. (23) The courts have also held that certain types of authors—i.e., lecturers, preachers, playwrights, dramatists, etc., may have a permanent monopoly to make money from the public because, until they have reduced their play, lecture, sermon, etc. to writing and printed it and sold or offered printed copies to the public, they make only a "limited publication." Their limits may be the universe. They may let all the world enjoy the "writing," yet they have not made a "general publication," so long as one or more written or printed copies have not been made available to the public.

On the other hand, an architect who never was known to have exhibited his plans to anyone was held to have made a general publication of them by permitting the public to see the building (quite a different thing to most of us). And the man who leaves his pamphlet in a hotel lobby or who deposits it in a public office, even though it has not been proved that a single person actually saw it, has made a general publication.

Furthermore, the concept of limited dissemination has been construed far more broadly for some types of authors than for others. The man who prints a book and attempts to restrict its use, claiming limited dissemination, has, in every case, been held to have made a general publication. Yet the dramatist who restricts access to his play only to the number of people who will pay admission, in every case except where he has actually printed and sold copies, has been held to retain his perpetual common law right of first publication.

If copyright is intended to be restricted only to printed copies, then the law should be revised to provide for that; if it is intended to encourage authors to make their writings available to the public, then it is defeated in respect to certain classes of "writings" by this broad concept of "limited publication."

Furthermore, a play printed and given "limited publication" would bear no notice of copyright. The user who obtains a copy of such a work would have no notice of monopoly—yet might suffer graver penalties for any use at all of such a work than for an identical use of a work copyrighted and bearing the statutory notice. Under the broad concept of "limited publication" now in vogue for

certain types of writings, the absence of statutory notice means nothing—time-consuming investigation would be necessary in each case to determine whether any work is in the public domain.

It would appear necessary, in keeping with the objectives of the copyright act and in the interest of reducing confusion as to what is permitted, to restrict "limited dissemination" to the original concept of permitting the author to use *the original copy* of his writing (whether that writing be a painting, a play or an essay) in any manner enabling him to improve or market that copy or to arrange for its sale or general publication. It should not include presentation of the contents to general public groups, whether they pay admission or not. (The only exception would be the exhibition of a work of art in a gallery in which the public is not permitted to make a copy, since that is the customary manner of marketing paintings.)

Any other use which would give access to the "writing" to any one or more members of the general public should be a general publication; the author desiring copyright protection can readily obtain that protection whether his "writing" be printed or not, and the Copyright Statute should be the sole means for obtaining a monopoly to make money from the public as a reward for authorship.

CHAPTER XV

When Is Copying "Copying"?

The statute is infringed only by "copying" that which is "copyrighted." (59). The meaning of the verb "to copy" is, therefore, of great significance. In some cases, "copy" has been said to be covered by the word "publish" (6).

Certain types of copying, which involve reproduction of multiple copies, fall under the doctrine of "fair use" and are permitted. Other forms of copying, such as that done by a student for his own use, have been held to be outside the scope of the statute.

Mechanical reproduction of the whole of certain types of works in multiple copies and for profit appears not to be forbidden by the statute and to be quite permissible.

Public performance of certain categories of copyrighted works for profit too appears not to be forbidden by the statute, and taking down a lecture verbatim for one's own use is outside the restrictions of the statute.

Clipping or copying of the exact words of citations from legal digests has been ruled to appropriate no literary ability in the arrangement or collection of the cases, and, of course, copying in any way and for any purpose of works in the public domain or of uncopyrighted materials within copyrighted works is not prohibited by the statute.

"Fair use" is a type of limited license to republish, which appears to be inherent in the nature of statutory copyright. The other types of copying noted above, however, do not appear to be "a copying" in either the common law sense of that term nor in the statutory sense of that term. They are not a form of "publication," as contrasted with copying under the doctrine of fair use, which applies only in cases of multiple reproduction for public use of material covered by statutory copyright.

The court decisions dealing with non-publishing reproduction (or non-copying copying, in the sense of statutory restrictions) are the following:

The earliest case cited as precedent for American decisions in the field of copying is the English case of *Queensberry v. Shebbeare* (147) in 1758. This case related to common law copyright, and the decision indicates quite clearly that there is a distinction between making a copy for one's own use and "copying." The decision states,

The defendant Shebbeare, by his answer, stated that the defendant Francis Gwynne had informed him that the said Henry, Earl of Clarendon, so long since as thirty-three years, delivered to his the said defendant's, Gwynne's, late father, to whom he was administrator, the original MS. of the history, that he might take a copy thereof, and make use of the same as he should think fit, of which a copy was taken. He admitted the agreement with Gwynne, and insisted upon his right.

The Lord Keeper continued the injunction to the hearing. He said, that it was not be presumed that Lord Clarendon, when he gave a copy of his work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; that Mr. Gwynne might make every use of it, except that.

According to *Abernethy v. Hutchinson* (1) in 1825, "copying" in the legal sense was clearly the printing of an edition for profit and not the making of a copy for one's own use. The court said,

I have not the slightest difficulty in my own mind, that a lecturer may say to those who hear him—"You are entitled to take notes for your own use, and to use them perhaps, in every way, except for the purpose of printing them for profit, you are not to buy my lectures to sell again: you come here to hear them for your own use, and for your own use you may take notes."

Similarly, *Bartlett v. Crittenden* (19) points out that lectures, oral or written cannot be published without the consent of the lecturer, though taken down when delivered. The earliest American case located, *Thomas v. Lennon* (177), points the difference between making a copy and public performance, saying, "If he should have the opportunity to copy it he would not be permitted to perform it." And *Nichols v. Pitman* (128) points up the fact that one may take down a lecture for his own use and that such copying is not a breach of any right at all, stating,

The defendant is a shorthand writer, and he attended and took down a copy—almost verbatim—of the lecture in shorthand; which of course he had a perfect right to do. Merely taking down a lecture in shorthand is not a breach of any right at all.

The owner of a copyright is not entitled to equitable relief against another publication solely because the writer of that other publication may have saved a certain amount of stenographic labor,

or of manual handwriting by cutting or copying the words of the citation from the digests, where no literary ability is appropriated in the arrangement or collection of the cases themselves. So an encyclopedia writer, who has formulated a proposition of texts and directs his stenographer to add to that text the citations shown by all of the digests would not be guilty of infringement (189).

The idea that there is a fundamental difference between making a copy or taking notes for one's own use and producing an edition for a commercial use was further highlighted in *Macmillan v. King* (113) in which it was determined that, even though an instructor might lecture upon the contents of a book without infringing and the students may take notes on such lectures without infringing, preparation of a study outline in an edition of multiple copies of the outline for his students by the instructor was a competing commercial use and did infringe.

Similarly, when hearers are allowed to make copies of what is said for their personal use, they may not publish for profit that which they have not obtained the right to sell (130).

These cases make it quite clear that the term "copying" in the Act does not apply to the making of a copy or of extracts by the scholar for his own use. The term "copy" in its legal sense appears to be limited to the publication (i.e., public rather than private reproduction) of multiple copies for sale or distribution, or to public performance or public presentation. The making of a copy for personal use appears to be completely outside the scope of the statute. And that is probably just as well. There would appear to be no possible mechanism for preventing such copying for personal use, and to attempt to prevent it would require the permanent assignment of a detective to live with every copy of every copyrighted work. Since it is outside the scope of the Copyright Act, such copying for one's personal use is not subject to interpretation under the doctrine of fair use, nor is it subject to any legal restraint whatsoever.

A somewhat more specialized interpretation of the term "copy" which helps to show that its legal sense is specialized and is not equivalent to the term copy in the everyday sense, is the fact that a musical recording of a poem is not a "copy" or a "publication" of the poem according to the statute. As stated in *Corcoran v. Montgomery Ward* (53).

Whatever may superficially appear to be the justice of the appellant's claim it is to be remembered that his case is governed entirely by the statute. And while in the 1909 revision of the Copyright Act, composers were given the exclusive right of recording their copyright musical compositions and the like right was granted to authors of copyrighted dramatic works, Congress did not see fit to give like protection to poems, stories or works of that nature.

Similarly, under the present Copyright Act, protection against public performance or delivery of copyrighted works (which is the equivalent of copying in the case of dramatic works), is afforded only in the case of a lecture, sermon, address, or similar production, a drama, or a musical composition. Other copyrighted works may be recited in public for profit without infringement (106).

In the light of these decisions, if printing constitutes "copying" or "publishing" and is a violation of the law, nevertheless, in some cases, at least, one may indefinitely multiply copies (in the lay sense) by mechanical, electronic, or other recording, and sell them for profit without "copying" in the statutory sense, or he may achieve the same purpose by reciting or singing the poems or stories which he wishes to reproduce, publicly, everywhere, for profit, without "copying."

Summary

1. Copying as used in common law, statute and court decisions has never referred to the making of a single copy by a scholar, or lawyer, or author, or anyone else, for his own use. The term, as an incident of literary property, appears to apply solely to production and/or sale of *multiple copies*, or, what has the same effect, the presentation to a group of people. It applies to public use rather than to private use. There appears never to have been a suit brought for infringement of common law literary property rights or copyright because of reproduction of extracts or of the whole of a work in a single copy by, or on behalf of, an individual for his own use. The making of such single copies, for private use, was never in the minds of those who developed the common law or the statute and such use of literary property is not affected by either. It violates no law at all and is a right of scholars.

2. Both statutory copyright and the common law right can be infringed only by "copying." Yet, reproduction of certain types of materials in multiple copies for profit is not counter to statute. The

statute appears to provide different degrees of monopoly to different types of materials, and forbids copying (in the statutory sense) only by the means protected to the author for the type of "writing" involved. Thus, it would appear from the statute that a copyrighted lecture or song may be presented publicly if it be not for profit, while a drama or dramatic work may not be presented publicly, whether for profit or not. A poem may be mechanically recorded and sold in multiple copies, or sung publicly for profit, while neither of these is permitted for a copyrighted song.

CHAPTER XVI

Infringement

Unlike patents, copyright does not give an exclusive monopoly. If two men invent the same machine independently (or similar machines designed to effect the same purpose in much the same way), the one who patents it first can prevent the subsequent inventor from using the machine which the latter has built. In the realm of copyright, however, both men would receive copyright protection for their works, even if they should happen to be identical, provided only that each produced the work independently—i.e., that there was no “copying.” The statute is infringed only by “copying” that which is “copyrighted,” (89, 59), and, if there is no “copying” or if the material copied is not copyrighted, there is no infringement.

To copy one must have access to the copyrighted work, and this poses a very difficult problem. Proof of “access” has in many cases been no more than assuming that, since the work was published and could be seen in any library or bookstore, the defendant, like all others, had “access” to it. In other cases, especially common law cases, it has been necessary to prove that a manuscript was in the defendant’s hands, or, at least, where he could have put his hands on it.

Furthermore, the problem of “colorable alteration” may make proof of infringement by “copying” very difficult. At best it is subjective, and the courts have held consistently that the standard of subjectivity must be that of the “average” listener or reader, whatever that may be, rather than that of the “expert.”

Copying is not confined to literal repetition or reproduction, but includes also the various modes in which the matter of any work may be adapted, imitated, transferred, or reproduced with more or less colorable alterations to disguise the piracy (92).

The question of piracy often depends upon a nice balance of comparative use made in one of the materials of the others. Many mixed ingredients enter into discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work and cannot fairly be treated as a piracy;

or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work and constitute the peculiar excellence thereof, and then it may be a clear piracy (79).

All the authorities agree that it is not necessary that the whole or even the larger portion of a work should be taken in order to constitute an invasion of a copyright; and they affirm the doctrine, that if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that such taking or appropriation is sufficient in point of law to maintain the suit (87, 91, 118, 10, 115, 61, 156, 50, 117, 89, 112).

In 1863, the courts took cognizance of newer methods of reproduction, recognizing that the piracy of a picture by the process of photography, or by any other process mechanical or otherwise whereby copies may be indefinitely multiplied, is within the statutes for protection of artists and engravers (82).

However, copies can be multiplied "indefinitely" in manuscript, and were so multiplied in considerable numbers centuries ago, so the term "any process whereby copies may be multiplied indefinitely" does not provide a very clear basis of defining methods interdicted or permitted. It does appear, however, to imply that there are methods of copying which are not within the statute.

Infringement does depend upon the kind of copying use made of the material copied. If the selections are made *animo furandi*, with intent to make use of them for the same purpose for which the original author used them, to convey in a different publication the information which he imparted, or to supplant him in his own territory, a small quantity will suffice to render the defendant liable to a charge of piracy (76).

While in general the courts have determined whether infringement occurred on the basis of copying of a substantial portion of the copyrighted work; in a few cases the judge used the percentage of the alleged infringing volume which was taken from the copyrighted work to determine whether the copying was "substantial." (67)

A very special phase of this problem is one in which the Court held that, while the defendant had the right to renovate and sell renovated books, reprinting parts of the books to fill in gaps was an infringement. The court stated, "So far as the same is a question of law the defendant has been guilty of an infringement of the copy-

right of the plaintiffs in that it has printed, published, and resold parts of the copyrighted books . . ." (84). If two imperfect copies had been assembled into one perfect copy, and that copy had been sold for profit, presumably no infringement would have occurred.

On the other hand, the point of view is presented in *National Geographic v. Classified Geographic* (125) that recompiling and offering the recompilation to the public, without reprinting or copying, is a violation of copyright.

Printing is not the only technique by which infringement may be effected. Production of multiple copies by photostat was held to infringe in *Midcontinental Map v. Kentzel* (119) and in *Towle v. Ross* (179). Offset reproduction, too, was held to infringe in *Donnelley v. Haber* (66, 174).

It is not essential to the existence of infringement that there be intention to infringe or that the infringement be for profit (136, 3, 47).

Summary

It is apparent that *copying of copyrighted material* is essential to infringement. But copying alone is not infringement. The copying must be material, but that alone is not conclusive. If the copying diminishes the value of the original sensibly and materially, there is infringement. However, determination of what "sensibly and materially" diminishes value cannot be decided except by a court. No criteria are provided to guide the scholar who does not want to infringe, but who must build upon what has gone before. He cannot determine in advance what may be construed as infringement. And if he should inadvertently use more, in what he conceives to be a fair use, than a particular court happens to think is the amount which does not sensibly or materially diminish value, his intention not to infringe, or his lack of intention to infringe, avail him nothing. If copyright is supposed to contribute to the advancement of science by making available publications for scholarly use, a definition of infringement which could be fairly applied by men of average intelligence in advance of use of copyrighted materials would go far towards achieving the objectives of the Constitution.

CHAPTER XVII

Common Sense About Literary Property

The Scholar as Author

Our recognition of literary property rights appears to be based on three fundamental concepts:

1. That writings of authors are valuable for the advancement of science and the useful arts;
2. That those who create writings have a right to participate in the fruits of their labors, in terms of credit and of direct monetary profits;
3. That the creative intellectual content of a work of authorship, quite apart from the ideas the work contains or the physical material of which it is composed, is a highly intimate form of personal property which should be protected against any public use except that to which its author dedicates it.

Confusion between common law and statutory rights resulted in loss of control of "writings" which should have enjoyed protection. Furthermore, the complexity of the interpretations in both fields has become so great that the protection of literary property, under either common law or statute, has grown excessively complex and costly in relation to the monetary values involved in many cases of misuse and infringement.

Simplification of the common law and statute, and of their interpretation and application, would, therefore, go far towards assuring authors of the rewards of authorship, and thus should facilitate and stimulate the dissemination of knowledge.

The scope of literary property rights, whether common law or statutory, should be related to the public purposes to be served and to the purposes and needs of authors.

The common law literary property right (i.e., the right of first publication) is of great importance to the scholar. It safeguards his literary property automatically and is the sole means of protecting that property until the author decides to make it available to the world.

Extension of this type of property right to protect the commercial use of the manuscript after it has been given general publication is not essential because the commercial uses after publication can adequately be protected by statutory copyright.

There appears to be no case in which the needs for protection cannot be met, in terms of the purposes which the author wishes to achieve by either the common law or a statute drawn for that purpose. The courts have held consistently that common law rights and statutory rights cannot co-exist, but the courts appear to have had difficulty in determining whether a work is to be protected by common law or by statute—and certainly do seem to have applied common law protection to works protected by statute in certain cases.

The four basic rights which have been claimed by authors, as noted in Chapter III (Philosophical Bases of Literary Property) are:

1. The right to privacy.
2. The right to profit.
3. The moral right.
4. The right to credit.

Each of these rights requires a slightly different kind of protection, and some of them require a combination of kinds of protection if they are to provide the protection required to encourage authors to make their works available to the general public.

The Right to Privacy

The right to privacy should, if possible, be recognized in the field of literary property. However, can a man claim the right to privacy for that which he has himself made public? If an author wants the protection of the common law for his right to privacy, he should have it in full measure. So long as he controls the use of his "writings" and permits their use only by individuals personally selected by himself to use his writings for his personal purposes, he should be able to retain his right to make first publication. Limited dissemination is a strictly private use and should not result in loss of the literary property to the public. If a writer is not guaranteed the right of purely private use, then the whole structure of common law literary property rights crumbles and disappears.

If the act of sending a letter not only transfers the paper and ink to the recipient but is a publication of its contents, then there would be no common law literary property.

An author must have the right to submit a manuscript to a publisher without making that act a general publication. If letting a second person see a manuscript under any circumstances were construed a general publication, then there would be no common law literary property and there would be practically nothing to protect by statute.

While the importance of the right of "limited dissemination" has been recognized, its limits have been ill-defined and its scope appears to have been broadened, in certain areas, to such an extent as to replace the need for statutory copyright and to grant broader benefits than are granted by the statute. If, by claiming the right of limited dissemination, an author can obtain a perpetual right to make public use of his work—by restricting the use which the public might make of it—it should be difficult to frame a statute which would encourage him to make his work available to the public.

Protection of the right of privacy must recognize the author's right to make any strictly private use of his writings. However, the right to public use, in any form, might well be governed by the statute, at least insofar as the right to privacy is concerned.

It would appear that the simplest and soundest basis for differentiation between what is to be covered by common law or by statute is to limit the common law literary property right to *private uses*, and to make all *public use* subject to statutory protection only. Thus, regardless of the type of material or the type of public presentation, any act by the author which makes the work available to any one or more members of the general public would be a publication, and would dedicate the work to the public unless the author obtains the limited monopoly granted by statute by complying with the simple requirements of the Copyright Act.

How Long Should Privacy Be Protected?

As noted in the chapters on common law literary property, the courts have consistently held that the only way the common law right is terminated is by a publication or dedication by the author, and that there is no time limit on this right.

In some cases cited in England, the courts have held that the common law right existed long after the death of the author, but our courts appear never to have defined what is meant by the term "indefinitely." In German literary property law, the literary property

in an unpublished manuscript terminates at a definite time after the death of the author.

If we confine the common law right to the right to privacy until first general public use, i.e., omit all public uses from common law protection, then the question as to duration of the right to privacy should be the sole remaining problem in relation to common law rights. The courts appear never to have ruled specifically on whether these common law rights ever can be terminated by time. Yet scholars and scholarly institutions would be prevented from making use of important historical documents unless this matter is clarified. If an author dies leaving no heirs, is there any legal manner in which public use of his manuscript can be made?

The right to privacy appears to exist so long as the use made of his writings by the author is not a public use. However, it appears doubtful that protection to an author's right to privacy will encourage any author to continue to produce "writings" after he is dead. Thus, the basis for recognition of his "right to privacy" after the death of an author must be somewhat different from that while he is alive. Just how far should society go in protecting the right to withhold writings from the public after the death of the author? Some courts have indicated that reasonable use, even use of personal letters, is permitted during the lifetime of the author. If that were not true, then every time we show a letter to a friend or relative, we should be violating a common law right—and even having a secretary open our mail would be a violation. One court pointed out that the extent of use permitted depends upon the type of letter, for example letters of extreme affection were held to have a seal of secrecy set upon them by the very nature of the letter. It seems difficult to define a permanent and absolute right on so tenuous a basis—particularly since "letters of extreme affection," which were said to be particularly confidential and limited in use by the court (15), are quite frequently introduced as evidence in certain types of court cases and become part of the public record.

It would appear that we have attempted to recognize not only a demonstrable and obvious right (i.e., the right to control his writings until he is ready to publish them) but also a tenuous and variable right of privacy consisting of the right to withhold permanently from substantially all users and uses. The right of privacy is not an invariable and absolute right in any other respect, and there appears to

be no reason for making it a more absolute right in relation to writings than it is in other fields.

When a person becomes a public figure—regardless of whether he is elected President of the United States or whether he is caught robbing a bank—the public's right to know about public figures appears to supersede his right to privacy.

When Winston Churchill addressed the Convocation at Massachusetts Institute of Technology, could newspaper reporters be stopped from reporting his speech in their papers? It appears that public figures lose much of their right to privacy, whether it be in their writings or in the matter of publishing their portraits, and in modern scholarship every man of past civilizations is a public figure of primary importance. It does appear, therefore, that the right of privacy can amply be protected whether it is incident to an author's control of his writings which he intends to publish for profit, or whether it be a segment of his private life expressed in a letter never intended for publication, by permitting the common law to protect the right of privacy for the life of the author and fifty years thereafter. This really means that the author will have become a public part of the web of history after he has been dead for fifty years, while adequately protecting to his immediate heirs the right of privacy and the right to publish the work for profit.

Of course, if at any time the author or his heirs dedicates the writing to public use by making any public use of it, then the common law right to privacy will have been lost with the common law right.

Right to Make the First Public Use

The right to make the first public use is an important right, and it is available only to authors and their heirs. If an unauthorized person publishes an author's work that should not destroy the author's valuable right to first publication, and the courts have held consistently that general publication can be made only by the author or with his consent.

However, this brings up the problem of the innocent infringer, who may receive no notice of copyright on the work published without authority yet be violating the author's rights. Should either the author or an equally innocent third party suffer because of the act of another?

This appears to be another case in which we have failed adequately to protect either the author or the innocent user of copies on

which there is no notice of copyright. After a manuscript has been made generally available to the public in any form, it would appear to be utterly impossible to erase it completely from public knowledge. It would appear, therefore, that the idea that a general publication has not taken place—when it has—because the author has not willingly given up his work to the public, may be likened to the ostrich who hides his head.

The work may become technically invisible to the law by this reasoning, but it has been made available to the public. The remedy would appear to be stringent damages and civil penalties for misappropriation of the author's private property or for invasion of his privacy, rather than claiming that the ostrich is technically invisible, while any passerby can actually see the ostrich and garner its feathers. The concept that only the author or his heirs has the right to first publication is sound and necessary. However, after a general publication has been made, it cannot be unmade. When a work is so published, it is in the public's hands and must be recognized as being in the public domain if statutory notice or the absence thereof is to mean anything. Thus the result of an unauthorized publication is a total loss to the author of his common law rights, or a complete and unjustifiable invasion of his privacy, or both, and the penalties and damages should be fixed according to the total values involved.

The right to make "limited dissemination" is another of the complex rights of authors under the common law. While the importance of the right to make limited private dissemination has been recognized, its limits are ill-defined and its scope varies according to the type of material. For example, it appears probable that the requirement that copies of a dissertation be filed in the university results in loss of the common law right in most cases, and filing a claim to invention with the Patent Office publishes that "writing." On the other hand, the concept has been broadened in respect to sermons, lectures, plays, etc., so as to provide broader benefits than can be granted by statute.

Thus, while protection of the right to privacy must rest upon recognition of the author's right to make strictly private uses of his works, varying interpretations either destroy this right upon the slightest kind of public use, or with other types of writings, over-extend its scope so as to defeat the public purposes of statutory copyright.

It would appear that the reasoning on which the concept of "limited publication" is now based goes back to the fact that originally in England the right to multiply copies in print and sell them, and the right to present a version on the stage, were covered by two different laws. In view of the many divergencies between English practice and American practice, this would appear a very tenuous reason, in common sense, for continuing the present confusion between limited and general publication. So long as such technicalities as these permit writings of authors to be used publicly for profit by others, as they now do in certain cases, they defeat the basic purposes of both common law and statute and are counter to the interests of authors or the public.

The simplest method for determining whether a work has been made public is the act of the author. The form of presentation is not determinative because printing as such is not a general publication, nor does the number of copies produced necessarily indicate the nature of the use. If a man should print five hundred copies of a pamphlet describing his qualifications, sending a copy to each of five hundred different organizations as an application for a position, it would appear that each of these is a strictly private use, just as much so as if each letter had been written separately. The determinant factor in such private use would appear to be the fact that the author personally selects each recipient. There would appear to be no element of public interest in such letters at the time they are written, nor would they be made available to any and all members of the general public by the author.

If, on the other hand, the writing is offered to be sold or is presented by the author to the public, it is difficult to see how that can be considered private use. The author who offers his work to the public cannot claim his right to privacy in making this public use. Thus, it would appear that the right to privacy should apply only in those cases in which the writer does not make his writing available to one or more members of the general public, whether for the purpose of making money from publication or public presentation of his work, or whether he offers it to the public for other reasons.

It is not possible to determine the intent of the author from the act of creation of a writing. All writings must be protected by the right to privacy (which includes the right to make any strictly private use of his manuscript) until the author, by some unequivocal act,

makes the manuscript available to be used or enjoyed by any member of the general public, i.e., to persons not personally selected by the author. Thus, when the author makes a general publication by offering or selling copies to whoever will pay his price, or by offering or giving copies to a public institution or office, he publishes it. Short of such acts as these, he, and generally he alone, has been held to have the right to make private use of his manuscript. Yet that does not appear to be completely true, because, as noted above, the degree of privacy inherent in his manuscript may vary.

The concept that "fair use" is not permitted in the case of unpublished manuscripts has been expressed by the courts, but it must be borne in mind that "fair use" exists only when publication (or republication) occurs. This dictum does not, therefore, protect the author against other types of use of his manuscript by others.

When A writes a letter to B, he must intend that B may read that letter. Does the author have the right to prevent the recipient of the letter from showing it to someone else? There have been no court decisions directly on this point, but it has been indicated (15) that the recipient of a letter normally has the right to show it to friends and relatives (i.e., to make a private use of it), and, of course, the recipient owns the paper and ink and may sell the letter or give it away. The only right guarded by either common law literary property or copyright is the right to *publish*, and private uses of the original manuscript appear to be quite outside the protection afforded by literary property law, whether common law or statutory.

Does the author have the right to prevent the recipient from using the ideas in the author's letter when writing a book—if the recipient does not paraphrase or copy the form of expression of the idea? There appears to be no question that ideas are not, and cannot be, protected as such by either common law literary property rights or by the Copyright Act. Only the expression of ideas in concrete form is the subject of literary property.

The privacy of a person cannot be protected as such by literary property rights. Literary property rights protect only a form of presentation. Putting it more concretely, if A writes a letter to B, stating clearly that A believes in vivisection, neither the common law literary property right nor the Copyright Statue would appear to prevent B from publishing that fact provided that he does not copy or colorably copy the statement in A's letter. Furthermore, if A

should sue B for libel or slander, it appears that B would have the right to produce A's letter in evidence, making it part of the public record, thus actually publishing the letter.

The writer of a letter who wishes to preserve his personal privacy must, therefore, if he wishes relief from what he considers to be an invasion of his privacy, seek that relief under laws other than literary property. The only right to privacy an author has in his manuscript as such then would appear to be his right ordinarily to prevent publication of the letter or manuscript.

Even if the common law were intended to protect privacy as such, rather than the right of first publication, there appears to be no way in which it could achieve that end. The recipient may sell or give the letter to another, and he to another. If B should give or sell the letter to C, and C and all subsequent owners should give or sell it to another within ten minutes of daylight, each would appear to be within his rights as owner of the paper and ink. The letter could theoretically pass through the hands of more than fifty legal owners every day, or more than fifteen thousand per year. It could be laminated so that it would last "forever" and continue on the rounds. Since there would appear to be no way in which the owner of a letter, who possesses it as a physical object, can be restrained from reading it, it is theoretically legally permissible for all the world to buy and read any letter, once its author has relinquished possession of the physical object.

Since the courts have said quite consistently that taking notes or making a copy for one's own use does not violate any right at all, and no one has been found guilty of infringement for making a copy of an unpublished manuscript or lecture for his own use exclusively, each of the owners of the manuscript could legally make a copy of the manuscript he owned, for his own use, at the time he owned it. Thus, there might be thousands of copies without "publication."

In view of the fact that neither common law literary property nor copyright protect the ideas in a manuscript, it would appear that the privacy of the individual must be protected by laws other than literary property laws, and that confusion would be reduced if we stopped trying to expand the literary property right to cover things which are not literary property.

The literary property of an author in his unpublished manuscript can really be protected by present common law rights only to the

extend of controlling the multiplication of an edition for sale or distribution, or its public presentation. Literary property rights cannot give an author protection against anything except "publishing," and he must look to other laws for protection of his privacy, or for protection against invasions of his property other than by public use. Strictly private uses of literary property, whether by the author or by others, have never been ruled to violate either the common law or the statute. There appears, therefore, to be considerable question as to whether the author alone may "use" his manuscript for private uses. The evidence indicates that anyone who legally has access to a manuscript may make any use of it he wishes, except to publish it (i. e., he may not make a public use of it).

The common law right of authors would, therefore, appear to be of significance primarily with respect to writings intended for publication. Private communications do not appear to be protected by literary property rights in terms of the personal privacy of the writer; and the right to privacy insofar as it is covered by literary property laws would appear to protect an author primarily in the production and marketing or distribution of multiple copies of his "writings."

Right To Dedicate

It cannot be denied that the author who, under our Constitution, is the only one who can obtain a copyright for his writings, or who can authorize another to obtain a copyright, may dedicate his work to the public or authorize another to dedicate it to the public.

The right to dedicate his work to the public is just as important to the scholar as is the right to copyright. In those cases in which the author wishes to obtain widespread dissemination of his writings, whether it be for the advancement of learning, for credit, or both, the copyrighting of his article in a journal of limited circulation may defeat the author's purpose.

The courts have recognized the right of authors to dedicate. However, they do not appear to have remembered to take this right into consideration in those cases in which they have inferred a transfer of the right to copyright from transfer of the manuscript with permission to print. Recognition of the right of the author to choose whether he will copyright or dedicate, or will permit others to copyright or dedicate, would appear to make inferred transfer of the right to do either dependent upon some act in addition to mere

permission to publish or lack of reservations in the transfer of the manuscript. (The right of the publisher [i.e., corporate author] to obtain a copyright for his journal or other composite work as a whole is not, as will be noted below, affected by the copyright or lack of copyright of any of the articles in it.)

The question then is which of the following four things the author may intend when he sends a manuscript to a publisher:

1. To copyright it in his own name.
2. To dedicate it to the public.
3. To authorize the publisher to obtain copyright.
4. To authorize the publisher to dedicate it to the public.

It would appear that the intention or purposes of the author in publishing the work might best be defined by his action.

The great bulk of modern scholarly publication, in terms of the number of "writings" involved, consists of contributions published in periodicals. American scholars rarely receive any payment at all for such contributions, and in an increasing number of cases are required to contribute to the cost of printing the journal either through subsidies paid from the scholar's membership dues in his association or by direct payment of part of the cost of publishing the article. While a few journals provide the author with a limited number of reprints free of charge, he is generally required to pay for the reprints he wants.

It would appear fairly obvious that an author who contributes his writing to a journal or to a composite work without asking for or receiving payment for it is not publishing primarily to receive a direct monetary reward. His objective may be the advancement of science—the primary purpose of copyright—or he may, directly or indirectly, wish to receive credit for making a contribution to the advancement of knowledge. Both of these objectives would be served best by the widest possible dissemination of the writing in question, rather than by limitations upon copying—so long as the republication of the separate articles does not reduce the support of the journals unduly and thus limit the number of journals available to the author for his future publishing.

There appears to be no evidence that reproduction of articles from journals reduces the sale of the journal as a whole or reduces the value of the copyright in the journal as a whole. In fact, there is some evidence that it may introduce more people to the journal, so

long as due credit is given, and thus may increase the subscriptions to the journal. The publishers themselves provide reprints to the author, and there appears to be no limit to the number of reprints an author may buy. The supplying of reprints to authors is not generally a source of appreciable profit to the publishers of journals, nor is there any evidence that it reduces sales of the volumes or issues of the journals.

The object of copyright is to advance the arts and sciences. The Congress would appear to have no authority to pass copyright legislation to retard the advancement of the arts and sciences. If the author does not want a monopoly to limit the dissemination of his writing, but rather will be encouraged to give his writings to the public by absence of such restrictions, it would appear contrary to the intent of the act to hold that someone other than the author may prevent the author from dedicating the work to the public unless there is a clear and direct transfer from the author to the publisher of the right to monopolize the author's writing for profit. The right to obtain copyright may not be inferred any more than the right to dedicate, and, in fact, when the author publishes his work without payment, the right to dedicate would appear to be quite positively indicated.

The true test would appear to be the objectives which the author seeks to obtain. The law would appear to be constitutional only insofar as it advances the arts and sciences; encouraging authors to give their works to the public by giving them in return an award which would encourage the author to do so.

If copyright were granted to authors only, just as patents are granted to inventors only, all confusion as to the intent of the author could be eliminated and the scope of the copyright coverage of composite works would be clarified. Since copyright is obtained merely by printing the notice, there is no appreciable cost involved in printing a notice by the author of each "writing" in a book. Each author could then indicate unequivocally whether he wished to dedicate or copyright by omitting or including his own notice on the first page of his own contribution. The "corporate author" of the work as a whole could do the same on the title page or verso of the title page, as he does at present. If this were done, then authors (both individual and corporate) could achieve their own purposes in the spirit of the Act, and problems such as "beneficial ownership" of copyright, "assigns or licensees," validity and scope of copyright, and

many other complexities of administration of the Copyright Act would be reduced substantially. Assignments or licensing could be made under the ordinary law of contracts apart from the complexities of literary property, and authors would no longer lose their valuable literary property because of confusion as to who may obtain copyright.

Right To Credit

The right to dedicate, discussed above, is related to the right to credit. Publication is the only ethical advertising recognized by many professions. There can be little doubt that the right to receive credit for his writings, to build a reputation through his published contributions, is a much more valuable right to authors of scholarly publications than is the right to sell copies for profit. The indirect profits from the reputation developed through printed contributions to the advancement of his science cannot fail to influence the scholar's professional advancement. Failure to credit a scholar with authorship of a work which he has created therefore appropriates his right to develop his reputation and thus appropriates both his name and his purse.

This right to credit is not recognized in either our common law or in Statutory Copyright. If the objective of recognition of literary property rights includes recognition of the fact that one has a right to the fruits of his labor, then recognition of the right to credit is basic to that end. The fruits of the labors of scholars in the greatest part of their writings is reputation rather than immediate cash return. That was not true in so large a measure when copyright laws were first written, but it is unquestionably true in the twentieth century. A law of literary property should recognize the right to credit as a very important literary property right; and the statute should continue that right regardless of whether it involves a monopoly of production and sale of works for profit.

Moral Right

The moral right, as noted above, conflicts in many respects with other rights such as the equally important right of the public to use public property. The only aspect of moral rights which would appear capable of protection without violating or abridging equally important rights, would appear to be the right of an author to have his work published or reproduced in the manner in which he wrote it.

This right is closely related to the right to credit. If a scholar's reputation is based in large measure upon his publications, he should

be protected against garbled reproduction of his writings which may affect his reputation adversely.

This concept would require that any changes in an author's writings, whether in print or in other versions, would have to be approved by the author. If this were done, quarrels of authors with producers, such as that between Mr. James Thurber and Mr. Goldwyn (*Life* v. 23, pp. 19-20, August 18, 1947), might be eliminated or perhaps would result in cancellation of the contract). It may be that the author is in a better position now, because he can pocket the profit while protesting the mutilation of his masterpiece. Of course, if the author wants protection in this respect, and can name his own terms, he can now insist upon a statement in the contract covering the extent of changes permitted.

It does appear that the right to be presented accurately is a moral right of authors which should be protected. However, it may be that laws other than the Copyright Act apply to misrepresentations of this type—as they do to other forms of misrepresentation.

Right To Profit

The right to share in profits resulting from his labors appears to have been the primary reason for passage of the first copyright act and it is still the philosophical basis for much of the copyright legislation. However, this right is relative, and the degree to which an author may share in any profits accruing from his labors depends in part upon his shrewdness in business matters and in part upon the type of his "writings."

A writer of a poem or a novel is not protected in his right to share in the profits of its public performance or its mechanical recording under our Copyright Act as interpreted by the courts.

This appears to be attributable to the fact that as new methods developed for making money from the writings of authors, we have attempted to identify these new methods in the law, changing the statute to include them. Thus, the statute has lagged behind the need for protection in many cases.

It should be clear, when an author sells his work or permits its publication for pay, that his purpose in publishing is at least in part to make money from its use. And in that case the statute should, to achieve its objects, make it possible for the author to share in the profits from any subsequent use, regardless of legal technicalities or technological developments.

Under present law and decisions, however, only the author or proprietor may obtain a copyright. Thus, in publishing his writing, if the author wishes to permit the copyright to be taken out in the name of a proprietor, he must assign the whole literary property to the "proprietor." If he does not, the copyright in the name of the publisher is invalid, and both author and publisher lose the right to control further publishing because the work falls into the public domain.

On the other hand, if the author does transfer the whole of the literary property to the "proprietor" who may then obtain a legal copyright, the author may have no further rights in that work under the copyright act, and the sole measure of his rights is the contract between him and the "proprietor."

This situation has in the past set many traps for author and publisher alike. In a number of cases both have lost the protection of copyright; in many other cases the author has lost the right to share in profits which he did not foresee at the time his contract with the publisher was drawn. The Congress has recognized this latter situation and has limited renewal rights to *authors*, so that an author who has sold his valuable rights for too little has a second chance. However, in relatively few types of cases does this remedy mean much, and in many cases the first copyright period substantially exhausts the profits to be made from a writing.

The protection of the author's right to profit would appear to be relatively simple. There is even precedent in the act for going so far as to protect the author against his own bad business judgment, if that is really desirable.

All that need be done to eliminate all the complexities of determining the right to obtain copyright would be to limit copyright to authors—as stated in the Constitution. The author (or corporate author) would obtain copyright for his "writing" by proper notice on his writing. Thereafter he could assign printing rights, serial rights, movie rights, or any other rights without losing any he did not wish to lose or did not specify—and the extent of the license or assignment he grants would be determinable under the ordinary law of contracts. In no case would either author or publisher run the risk of losing the copyright, as they do now, through inadequacy of assignment.

The right to be protected, in the case of the author who publishes for monetary returns (which may always be determined from the

agreement which the author made with the publisher or the conditions under which the author published his work) is the right to share in any profits which result from any use of his work, and conversely, the right to prevent others from reducing his profit by using his work publicly in any way, whether for profit or not, which substantially and materially reduces his profit.

This right should be determined by the fact of such unfair use, regardless of its form, and it does not appear reasonable to base the value of a copyright on the physical form of the "writing involved." If copyright is to protect the author's right to share in profits from his work in order to encourage him to make his work available to the public, it should protect his right to any method by which any public use may be made of his work. His poem should be protected from public presentation, and his novel from mechanical recording; otherwise authors will continue to wage a battle to bring the Copyright Act up to evolving technology and will lose the right the Copyright Act is supposed to protect, at least for a period, every time technology gets ahead of the specific provisions of the Copyright Act by evolving a method of mass communication not foreseen by the act.

Summary

1. Simplification of literary property laws is essential to safeguard the rights of authors.
2. The common law right should be limited to the right to make first general publication or to prevent such a public use. Preferably this right should be included in the statute to avoid problems of jurisdiction.
3. The life and writings of any person should be declared by law to be part of the common historical heritage fifty years after the death of the author, i. e., the author should be considered a public figure and his right to privacy should cease when he has been dead fifty years.
4. Statutory copyright should cover all public uses, in terms of the rights the author intends to assert, regardless of the type of work or the type of public use.
5. The right to make the first general publication or the first public use of any type should be reserved to the author alone.
6. An unauthorized general publication or unauthorized public use cannot be undone once it is made. It results in total loss of the

literary property and the penalties ought to be stringent enough to compensate the author for this total loss of his literary property.

7. The right to make private use of an unpublished manuscript cannot be limited to authors.

8. Privacy cannot be protected as such by literary property laws. Persons whose privacy is invaded must look to laws other than common law literary property or Copyright Acts for relief.

9. Authors have the right to dedicate their work to the public.

10. The author's intent to dedicate or to obtain a monopoly may be determined from the circumstances of publication and specifically from whether or not the author has made a contract to receive monetary profit from future public use of his writing at the time he authorized the first public use.

11. Authors and publishers should receive more positive protection, and the complexities of the law would be greatly reduced if copyright were issued to authors only (or to his heirs, if the author is dead).

12. The right to credit is frequently more important than the right to profit, and the Copyright Act should recognize that right.

13. The moral right should be recognized to the extent of protecting authors against misrepresentation or mutilation of their works.

14. The right to share in profits should be protected in all cases in which the author's acts in connection with publication indicate that it was the author's intention to share in financial profits.

15. The right to share in profits should cover all types of material for any type of public use.

Author or Publisher

The Constitution grants authority to the Congress to protect authors' rights, but does not authorize the Congress to grant copyright protection to anyone else. It appears that the concept that a proprietor may obtain copyright protection is primarily a device by which the author may transfer his complete literary property to another and may authorize the second party to obtain the copyright. While this may have been necessary under former copyright laws—when certain steps had to be taken in sequence and at certain times in order to obtain a copyright—it is no longer of importance, since the author may now obtain a valid copyright merely by having proper notice printed in his work.

Many copyrights have been lost because of confusion as to who may obtain copyright. In one case, even though the proprietor of a copyright owned more than ninety per cent of the stock of the corporation which was named in the notice, the court held that the corporation was not the proprietor and that the copyright was, therefore, invalid. Thus, the corporation, the proprietor and the author all lost the rights which the law intended to secure to the author, and which, if the law had been complied with, the author could validly have assigned to the proprietor, the corporation or both. Such technicalities as this appear to be quite unnecessary. They contribute nothing to the purposes of the act and may defeat its purposes, and they complicate the law unduly so that defense of the rights granted becomes uncertain and in many cases becomes costly out of all proportion to the financial value of the right to be protected.

The inclusion of the word "proprietor" in the act adds nothing to the rights of authors. Nor does it give the publisher or proprietor anything that he cannot obtain equally well—and with less danger of loss—by contract with an author in whose name the copyright is entered. The proprietor must have such a contract to obtain a valid copyright.

Since, as has been held consistently by the courts, the proprietor must trace his ownership from the author, the copyright in his name adds nothing to the adequacy of his protection and may destroy all protection. If the copyright is properly noted in the name of the author, then the contract between the publisher and the author, which sets the limit of the publisher's property in any case, should provide the publisher with enforceable rights in a valid copyright.

When the author makes a complete assignment to the publisher, the publisher may obtain a valid copyright. However, the question as to whether a full assignment was really made must always be finally decided by the courts, and, if the court finds that the assignment is not complete, but rather is a license, then, if the copyright is in the name of the proprietor, it becomes invalid and all rights are lost; if, in this case, the copyright is in the name of the author, then the copyright is not affected and both author and publisher retain such rights as the contract between them is construed by the court to grant to each.

Probably the only reason why copyrights are ever taken out in the name of a "proprietor" rather than in the name of the author,

since valid copyright may be obtained by either, is the belief of the proprietor that he may gain more or get better protection by having the copyright in his own name than he can by contract with an author who obtains the copyright himself. However, the only way the publisher can gain in that respect is at the expense of the author—whom copyright must primarily be intended to protect.

If an author assigns full rights to a publisher, a sufficient assignment to enable the publisher to obtain a valid copyright in his own name, and nothing is said in the contract about sharing the profits from types of use which are not foreseen by the author or publisher or both then the author may lose his right to share in such profits from his "writings" and they may accrue to the proprietor.

The Congress recognized this possibility and has attempted to provide some additional protection to authors by limiting renewal privileges to *authors*. The stated intent in so doing was to give the author who has disposed of his literary property at less than its full value a second chance to obtain his share of the profits from his work.

Publishers, too, in many cases, have recognized that, while they have had to obtain a full assignment in order to get a valid copyright, it was not the intent of their contract with the author to give them all uses and to exclude the author from all benefits. In such cases they have reassigned (or licensed) to the author the right to make all uses of the copyrighted work which were not intended by the contract to be given to the publisher.

Thus, the authors of short stories or novels often obtain from reputable publishers reassignment of all rights which were not intended to be transferred as part of the contract which permitted the publisher to use the writing and to obtain a valid copyright for the work as proprietor. However, these legal transactions, each capable of diverse court interpretations, cannot, at best, make the author more than a licensee for certain uses of his own work, and his ability to bring suit under the Copyright Act as a licensee may by no means be considered to be established.

Just what the advantage of the above procedure is—and to whom—is not clear. It adds uncertainties and gives less positive protection to both than would be achieved by copyrighting in the name of the author and licensing the publisher for whatever use it is agreed that he is to make.

While the author may, in some cases, lose the right to share in the profit derived from certain uses of his work, it is not at all certain that he will do so. The theory of beneficial interest indicates that at times, at least, the author may retain rights in a publication which he has assigned in toto to another.

For example the Second Circuit Court of Appeals said in *Browne v. Fowler* (213), "The owner of the equitable title is not a mere licensee, and he may sue in equity, particularly where the owner of the legal title is an infringer . . ."

Similarly, the Third Circuit Court of Appeals said in *Bisel v. Ladner* (210),

The trial judge properly found that the beneficial interest in the copyright was retained by Mr. Ladner. Complainant has the right to sue in equity . . . Here . . . the complainant is not a mere licensee, but has the full equitable title, and Wooster, who has the legal title, is one of the infringers and occupies a position altogether hostile to the complainant. Its right in this situation to sue in equity in its own name is plain in principle and well established by authority.

In 1937, it was said, in *Cohan v. Richmond* (218),

A publisher may take out copyright, and, although legal title vests in him, it may, however, be held in trust for true owner and the question as to true ownership is one of fact dependent upon the circumstances of the case.

And, it was stated in *Hoffman v. Santly-Joy* (234) in 1943,

The plaintiffs have not set forth the . . . circumstances under which the copyright was registered in the name of Edwin H. Morris & Co. . . . "for the benefit of the plaintiffs herein" . . . Before serving the second amended complaint plaintiffs should consider making Edwin H. Morris & Co., Inc., as the owner of the legal title, a party to the action. Plaintiff may make that corporation a party defendant or an involuntary plaintiff if the corporation refuses to join in the suit.

On the other hand, the Second Circuit Court of Appeals said in *Brady v. Reliance* (212) that the equitable owner cannot defeat the title of one who deals with the person in whom the legal title is vested. Thus, equitable ownership, even if established, may possibly be defeated on occasion by contracts made by the owner of the legal title.

Publishers as Authors.—When a publisher creates a work or has it created for hire, he is the *author*. He may copyright the work as author and obtain the same protection that is afforded to any other author. Composite works are "writings" even though they are

nothing but compilations of other works of varying copyright status. The publisher, if he creates a periodical or other composite work or has it done for hire, is the author of the work as a whole, and may obtain copyright for the work as a whole. However, that does not make him author of the individual contributions of others contained in the composite work, nor does the copyright of the work as a whole cover the individual contributions as such, unless they happen to be the writings of the author of the whole or have been assigned to the author or proprietor of the whole work by the author of the article concerned.

Questioning of many publishers and scholars indicates that almost universally, when a scholar sends a paper to a journal for publication without fee, nothing at all is said on either side about copyright. While the courts have not ruled uniformly on inferring transfer, it appears that transfer of literary property may not be inferred; and, even when payment was received by an author and he signed a receipt in full payment, the most recent holding was that even that did not infer a full assignment of the literary property. Thus, while the courts have not ruled on the case of the scholar who sends his writing for publication without pay, and where nothing at all is said about copyright or transfer of the literary property, they have ruled that a proprietor must trace his right to copyright from the author, and that more than an allegation or the mere fact that the publication was authorized must be proved in order to infer that an assignment adequate to authorize copyright has been obtained.

Thus, it is exceedingly doubtful that the publisher of a journal is either author or proprietor of the average article published in a scholarly journal, where the author has permitted its publication without pay and generally without indicating in any way that he intends to give the publisher the right to monopolize the work in the future through copyright.

Since the copyright in an issue of a journal or of any other composite work protects only those parts of which the copyright owner is author or proprietor, the great bulk of the articles in such works are probably without protection. The publisher is protected in the journal as a whole and in those parts of the journal such as the title page, index, arrangement, running heads, and the like, which he created, but unless he wrote the articles or obtained a demonstrably valid assignment for each from its author, the articles are not copy-

righted by the notice in the journal. And, unless they carry the author's notice of copyright, each of such articles which was not written by the proprietor of the journal, or which was not assigned to him by the author, having been published with permission of the author and without notice of copyright, would appear to be in the public domain. Thus, it is quite likely that a very large proportion of scholarly periodical literature is public property, even though published in composite works which are protected as a whole by proper statutory notice.

Furthermore, even if such articles were ever validly copyrighted, the common custom of issuing reprints without notice of copyright on the reprints would void the copyright in such articles— if it ever existed. The courts have held without exception that authorized republication without notice terminates the copyright of the material so given general publication.

Thus, it appears highly questionable whether the individual articles in most scholarly periodicals ever were protected by copyright; and it appears conclusive that such of them as were reprinted without notice (which is quite commonly the case) have lost their copyright protection if they ever were validly copyrighted.

Perhaps this is just as well, since it appears to be the intent of scholars to give this type of material widest possible circulation, rather than to withhold it for profit.

Since the periodical as such is protected and since the protected parts of the issue protected cannot be multiplied either substantially and materially or as a whole without infringing the proprietor's copyright, the proprietor would appear to lose nothing which he has a right to protect. If, however, the author does not want to dedicate his article, the remedy is simple. All he need do is have his copyright notice printed on the first page of his work, and on all reprints. Under the present law the proprietor of the copyright in the journal could also protect the articles if the author is willing to assign that right to the proprietor *and actually does so*, and if the notice is reproduced on all reprints.

One of the interesting questions which has arisen from the general practice of sending articles for inclusion in journals is that, in many cases, the author himself has been uncertain as to whether he may make any further use of his own writing, which he submitted without pay, as a contribution to the advancement of learning, and

which many publishers assert becomes their property by virtue of the copyright notice on the journal in which it appears. Thus, according to this theory, the author who is paid nothing for his pains must take further pains to use his work for the purpose for which he intended it to be used by the man whom he favored with permission to make money from one use of it. Since the author has the right to dedicate, it would appear that, if it was his intent to dedicate, and if he has done nothing from which some other intent must be inferred, one with a secondary right cannot defeat his purpose. And, of course, if the work is dedicated to the public, anyone, including even its author, should be able to make any use he chooses of the work so dedicated.

This problem does not appear to arise quite so commonly with respect to ordinary books and other non-composite works. The scholar who writes a book ordinarily appears to expect some compensation for it, and thus the arrangements with the publisher are generally quite formal—indicating, among other things, whether the author intends to assign ownership of the literary property to the publisher. Furthermore, reprints of books generally carry the copyright notice. Thus, the question of validity of the copyright arises less frequently here than it does with periodical articles. However, it does arise from time to time, particularly with reference to composite works and to books issued in several forms, and the surest way to protect both the author and the publisher would appear to be copyrighting in the name of the author in all cases.

The principle that a copyright covers only the copyrightable component parts also affects the protection of auxiliary parts, even in what appears to be a single work. Thus, the illustrations in a novel, if prepared by someone other than the author of the book, will not be protected by the author's notice of copyright of the book unless the author is the creator or proprietor of the illustrations. Here again, the notice should indicate scope of the copyright or confusion results. Under the principle of protecting authors, each unit of literary property should bear a notice protecting the author of that unit; thus illustrations as well as the book as a whole should bear the notice protecting their authors. Unless this is done, the illustrations may be and have, in the past, been ruled to be in the public domain, even though the work itself may be copyrighted by the author of the entire work.

The cash values involved do not determine the right to copyright protection. Any "writing" of any "author," regardless of its bulk, form or merit, is eligible for copyright protection. However, the notice protects only what is copyrightable, and it is rarely possible, merely by examining the book, to determine just what the notice is intended to cover or what it actually does protect. This has caused confusion not only among users, but among authors, illustrators and publishers as well, and it has resulted in loss of protection which the law was intended to provide. While the notice by the author may protect his own contribution to a periodical, it does not necessarily protect illustrations provided by the publisher as part of the presentation. If those illustrations were prepared for hire on behalf of the proprietor, then he is their author and his notice of copyright in the journal protects the illustrations but not the article or story.

If the illustrations were prepared for the author for hire, then the author of the article is the corporate author of the illustrations and they are protected to whatever extent the author's article is protected. If they were not prepared for hire, then they can only be protected by a notice of copyright by the illustrator or his assign (who may be the proprietor of the magazine, the author of the article or some other person) or they will fall into the public domain.

Now assuming that an article copyrighted by the author appears in a journal copyrighted by its proprietor and contains illustrations copyrighted by the illustrator—which can happen under our copyright law—would all three be entitled to sue for one infringement? Would any one of the three be permitted to grant permission to make a copy of the article without consulting the other two? Would all three have to be party to a suit in order to establish the right of any one of them to sue?

All this confusion can be eliminated by relating the coverage of the copyright to the coverage of the notice. If the illustrations are to be used alone, then as property of the illustrator, his copyright would govern. Having granted the right to the author of the article to use his illustrations in connection with the article, the illustrator should not thereby have the right to prevent the author's use of his copyrighted article including its illustrations, and the author's copyright should govern the use of the article as such, including any illustrations incidental thereto. Similarly, the author's license to the corporate author of the periodical should not prevent the corporate author of

the periodical from using his periodical, and the copyright for the periodical should govern use of the periodical issue or volume as a whole.

At times the interests of an individual author and an individual publisher do appear to conflict. Generally, however, this occurs when one or the other fails to keep his part of a contract. When the publisher fails to pay an author for his writing as agreed upon, should the publisher have the right to copyright the author's work and make money for it for the next twenty or more years?

A few cases in which this has been considered by the courts have indicated that, when the purchaser fails to fulfill his contract, the literary property should revert to the author. However, if the "proprietor" turns out not to have been the proprietor, it would appear that the copyright in his periodical does not cover the article in question, and thus the article, published with permission and without copyright, is in the public domain. This, too, could be avoided by limiting copyright to authors, and by limiting protection to the "writing" covered by the notice. If this were done, republication of an article would be governed by the author's copyright of that article and not by the proprietor's copyright of a magazine—which may or may not copyright that specific article.

Since deposit in a public place is publication, deposit of copies of a thesis in a University Library, particularly in a public institution, is undoubtedly publication. In this case the University publishes—with permission of the author—by making the work available to the public. The author should be instructed about his literary property rights. Students who wish to obtain degrees must make such a deposit, and unless the theses bear notice of copyright and the author complies with Section 12 of the Act, he probably will lose control of his work. Not only must all copies published in any manner bear the statutory notice, but one complete copy of a work not reproduced for sale must be deposited with the Copyright Office, with claim of copyright in order to secure copyright.

Summary

1. There appears to be no fundamental conflict between the rights of authors and the rights or requirements of publishers. While publishers are not protected by the Copyright Act, authors could not adequately market or make public use of their writings without the assistance of publishers, and publishers would have nothing to publish

if the copyright objectives of authors are defeated. Both have much to lose and little to gain by defeating the purpose of copyright.

2. The author, whether individual or corporate, is the only one to whom copyright may be granted according to the Constitution. The publisher's or proprietor's rights provided by statute appear to be secondary, confused, and to result at times in loss of the literary property.

3. Much of this confusion should disappear if copyright were limited to authors or their heirs, just as the right to obtain a patent is limited to the inventors.

4. If that were done, assignment, licensing, etc., should be governed by ordinary law of contracts and should not be part of the Copyright Act.

5. Since the contract is determinative of the scope of the rights granted, this would make no change in the relationship between author and publisher and would eliminate the possibility of complete loss of copyright protection because of inadequate assignment.

6. While the courts speak of the rights of authors, they frequently appear to deal with rights of publishers—which is not the same thing. Since copyright as such may be granted only to authors, in cases of conflict of interests it would appear that the weight of the copyright law must be on the side of the interests of the author. That would not be true with respect to contracts decided outside of the Copyright Law as such.

7. The creator of a work is its author, whether he creates it with his own hands or hires someone to do it for him.

8. Authorization to use a copyrighted work as part of a larger copyrighted work should include authorization to republish it as part of the whole of the larger copyrighted work.

9. It is doubtful that more than a very small percentage of scholarly journal articles are actually copyrighted, even though the issue of the journal may be protected.

10. The intent of the author as shown by his action must determine whether he has dedicated or copyrighted his work.

The Scholar as a User of Literary Property

The purpose of copyright is to encourage the advancement of the arts and sciences. There are two schools of thought as to how this may be done. One maintains that protection of the literary property right is an end in itself—i. e., that such protection encourages authors

to write, and that the act of writing *per se*, is in the interest of the advancement of learning whether the "writing" is ever made available or not. The second school, representing the majority of decisions, maintains that copyright is an expression of the public interest and that it is only by making writings available to the public, so that ideas are made available to a wider group, that society gains, and that copyright monopolies are justified.

Not only does the latter point of view receive the weight of court opinion as such, the intent that writings be made available to the public appears clear from the very nature of the Copyright Act. While *patents* and *copyright* both draw their legal authority from the identical words in the Constitution, the patent law specifically grants a monopoly of use while the copyright law does not. Indeed, if encouragement of dissemination were not the object of copyright, then the common law would protect against use better, and a copyright law would be completely unnecessary.

It may, therefore, be stated that *the object of copyright is use*. As noted in the section on Statutory Copyright, many uses appear to be clearly justified by the law or by court decisions, while others, which have been common for many years, have never been contested.

The rights of scholars to use copyrighted materials appear to be divisible into three major classes:

1. The right to access;
2. The right to make uses not reserved to the owner of the literary property by common law or by statute; these are primarily private uses, for his own study; and
3. The right to make limited public use, under the doctrine of fair use.

The right to access does not exist with respect to all unpublished manuscript material. In general it is said not to exist at all. However, a diligent scholar who locates a copy of manuscript generally succeeds in seeing a copy of it. There appears to be nothing that prevents the owner of a manuscript from showing it to a scholar—or from giving it to a scholar, or lending it, or selling it. The only thing which the owner of an unpublished manuscript is not permitted to do is to publish it. No court has ruled that the owner of a manuscript who is not the owner of its literary property may not permit a scholar to study it. Perhaps the right to access in this case

should more properly be termed a privilege, since it would require the consent of the owner of the physical object.

So far as copyrighted material is concerned, the right to access would appear to be a positive right. Copyright cannot exist without a general publication, and a publication theoretically makes the work available to be used and enjoyed by any and all members of the general public.

This right, however, as noted above in the discussion of the rights of users, may be more theoretical than real in practice. The responsibility of the copyright proprietor to make copies available to everyone willing to pay for them has not been firmly established except in the field of mechanical recording of music; in which case the law specifically provides that, after the author has once authorized mechanical reproduction, anyone else may make a similar use upon payment to the copyright proprietor of a royalty of two cents per part so produced.

Access to most copyrighted scholarly publications depends in part on the extent to which it has been profitable for the author or publisher to issue copies and to keep them in print.

One great source of difficulty has been the confusion noted above about ownership of the copyright in journals. Scholarly journals are rarely kept in print very long after the date of publication, as will be attested by anyone who has had much experience in trying to fill in gaps in sets of journals. When the issue is sold out, the publisher does not ordinarily reprint it—in fact he rarely reprints issues, even though he may, occasionally reprint whole volumes or sets.

During wars particularly, editions are small and are soon exhausted.

Neither the author nor the publisher can profit from a book or periodical which is out of print. Probably the only one who can profit from it is the second-hand book dealer who has no rights at all, under copyright, to profit from the work of authors. Scholarship is seriously hampered by copyright restrictions in the case of publications which are out of print. The greater the difficulty in obtaining copies, the better the price they bring in the second-hand book market.

Modern methods of single copy reproduction are always more expensive than edition printing and are generally less satisfactory than the book in printed form. This will probably always be true,

at least so far as cost is concerned. Any process which may be developed which will produce a single copy more cheaply than printing does will produce editions more cheaply than it will produce single copies. This is inevitable and will probably always be true because the cost of handling single copies and bookkeeping for single copies, overhead involved in getting ready to run the copy, etc., will always be greater when the total cost must be charged against one copy. It appears, therefore, that production of single copies, each on the request of a scholar or scholarly institution will never seriously interfere or compete with productions of editions. So long as the copyright proprietor is in position to supply copies, no sensible person will want an inferior, bulkier, harder-to-use, made-to-order copy. If the copyright proprietor does not have copies to sell in the original form, he has access to all the means of single copy reproduction which are available to anyone else. If the copyright proprietor is not interested in stocking or selling copies in any form, then he should have no objection to having others make single copies for scholars. Once the work is published, the copyright proprietor does not appear to have the right to prevent access to the work.

The only objections on record from the point of view of the publisher are (a) that a few copies made one at a time may, in borderline cases, make it uneconomical for him to reprint, and (b) that the copyrighted work is his property and the fact that he has no copies to sell does not destroy his property right. The answer to the first point is that the publisher should be able to decide whether or not to reprint in a reasonable length of time—say six months—and should not require fifty-six years to make up his mind. As a matter of record, thousands of copyrighted books are out of print and thus not readily available to scholars, and even more thousands of issues of periodicals stay out of print permanently.

Since the scholar generally can get a copy of what he needs in one way or another, the chief question would appear to be whether he must waste time and money to comply with an alleged right which neither profits the author nor advances science. The principles of *De Minimis*, and also the principle of private use, probably give scholars the right to access by making a single copy or having it made, and this has been recognized by many publishers. Some publishers refer scholars to copying services when they cannot supply copies and

many subscribed to the "Gentlemen's Agreement," which will be discussed below.

The right of scholars to make copies for private use would appear to be independent of whether the book is available from the copyright proprietor, but except in very rare cases scholars will not choose an inconvenient and more costly form when the publication is in print.

The principle involved, however, is that the scholar has the right to access to any generally published work. All copyrighted works must be generally published to be copyrightable. The copyright proprietor cannot restrain access to his copyrighted work, and, if he cannot supply copies, cannot require that the scholar use uneconomical and time-wasting methods for securing access to the material which he is entitled to use for his own studies.

Right To Make Private Use

Closely related to the right to access is the right to make any private use of the ideas or presentation of a copyrighted work or in an unpublished manuscript to which the scholar lawfully has access.

This right is quite independent of whether the private use is for profit or not. As the courts have pointed out, lawyers and judges earn their living by use of copyrighted works, and all scholars do the same to a certain extent. The very purpose of making works available is obviously at least private use.

If the student could not take notes of a lecture and use the information gained to pass an examination or for any other personal or private use, there would be little point in attending lectures. If the judge could not cite authority or the lawyer could not use it in his brief, who would want law books? And if using knowledge gained from a work protected by literary property rights in any private form of use were prohibited, there would be no buyers for books.

Among the private uses which have been recognized by the courts, or have never been challenged, in addition to the right to take notes or have extracts or a single copy made for the scholar's use, are the right to make any use for which the publication is intended, the right to lend, resell, destroy the work or maintain the work in good condition, the right to use the ideas in the book, etc. In fact no strictly private use of any sort by a scholar for his own purposes has ever been interdicted. The sole right granted by

copyright deals with the publishing of editions; and personal uses, which are not public uses, appear to be wholly outside the scope of either common law literary property restrictions or statutory restrictions.

Right To Make Public Use

Even public uses of certain types are permitted under the principle of Fair Use and the principle of *De Minimis*. It must be borne in mind, that the only thing either common law or statute can be intended to protect, or can actually protect for that matter, is the right to make public use. Furthermore, the only public uses they can possibly be aimed to prevent are either uses for profit or uses which interfere unfairly with the author's right to profit. Public uses, whether for profit or not, which further the author's purposes, as when the author publishes for dissemination rather than for profit, or which do not unfairly compete with the author in his field, must be considered part of the object for which writings are created.

The chief problem in differentiating between "fair use" and "unfair use" or infringement is lack of definition of these terms. The difficulty in defining them rests in part on the differences in nature of writings of different types, and the court have hesitated to fix any uniform basis for determining what may constitute fair use. In a few cases both courts and publishers have indicated percentages of the original work which may fairly be republished, and these percentages range from ten to fifty. In other cases it has been intimated that just a very little copying may extract the value of a publication. However, if less than ten per cent of a work can express its full value, the conclusion would appear inescapable that, in such cases, the user has to pay for a tremendous lot of unnecessary verbiage in buying the book.

While any mechanical system of determining fair use would be faulty in many cases, it would hardly appear possible to cause more complexities and injustices to authors and scholars than are caused by the present confusion on this subject. It is suggested, therefore, that public use (i. e., republication) of less than ten per cent of a copyrighted work in either competing or noncompeting use, be declared fair use. Any public use of more than ten per cent of the copyrighted work, whether for profit or not, and whether by reproducing and selling multiple copies or otherwise, would automatically be an infringement if done without the permission of the author.

Of course, in the case of works published not for profit, any amount of reproduction will help the author to achieve his purposes and thus would be a fair use.

The principle that some copying is not "substantial" has been recognized in literary property cases but has never been defined. How much is too little to bother about? Certainly the royalty to the author (particularly when he received no pay) and the loss to the proprietor through copying of a single copy of a periodical article cannot be very large, nor can the loss from one extract copied from a book be very much. Perhaps the best way to reduce the complexities in judging these types of uses would be to say that whenever the amount of profit or damages involved is ten dollars or less, the amount copied is not substantial.

Summary

1. The purpose of copyright is use.
2. Scholars have a right to access to copyrighted materials.
3. Scholars have a right to make any private uses of literary property to which they legally have access.
4. Scholars have a right to make limited public use of copyrighted material under the principle of fair use.
5. Determination of what constitutes fair use should be made mechanical so that both copyright owners and scholars may know their rights, and republication of less than ten per cent of the whole work covered by a copyright should be considered fair use.
6. Production of multiple copies of more than ten per cent of copyrighted works should be unfair use, whether for public or private use, if the works are in print.
7. Production of single copies, of extracts or of entire works, by or on behalf of scholars is a private use which is not interdicted by the Copyright Act.
8. Public uses which result in potential loss to the copyright owner of less than ten dollars should be permitted as not being substantial or material.

CHAPTER XVIII

Literary Property and Scholarly Institutions

The Library is one of the primary sources of copyrighted material. The position of the library in relation to literary property is somewhat different than that of the individual scholar. While some of the things libraries do for individual scholars are probably private uses, under the theory of agency, by and large the use of literary property by a library is predominantly a public use rather than a private use.

Manuscripts

This results in a very complex situation in relation to manuscripts placed in libraries. What does that do to the common law right of the author to make first publication?

The courts have said consistently that placing a copy of a manuscript in a library, where it may be consulted by any member of a broad public, is a general publication; and, if copyright is not secured, this publication puts the manuscript into the public domain. If the term "general publication" is to have any meaning beyond the legal abstraction, the conclusion is inevitable that placing a manuscript where it may be enjoyed or used by any member of a large and general public is a general publication.

Regardless of what it is termed, then, placing a manuscript in a library open to a general and varied group does make its content public. This problem has worried librarians and other scholars, and many attempts have been made to rationalize the use of unpublished manuscripts in libraries, or to apply restrictions to the use of manuscript materials. While some institutions apparently work on the theory that certain types of restrictions (or better yet, certain magic words) may preserve the common law rights of authors while public uses are made of their works, there appears to be nothing in the law or in the court decisions to support that point of view.

The courts have held that offering a manuscript to the public constitutes a general publication whether the manuscript was actually read by the public or not; and that filing a copy in a public office or

public place is *per se* a general publication, even where there is no evidence that any member of the public had actually seen it. So long as the common law right of first publication is held to last forever, there would appear never to be a time when a library might legally accept a manuscript unless the right to publish accompanies it.

When the owner of the literary property in a manuscript offers or transfers his writing to a public institution, he almost certainly makes a general publication of it by that action. It is not customary for the owner of the literary property to place restrictions on the sale of a manuscript which would prevent it from being sold to a public institution; and, if a public institution should buy it, the author or owner of the literary property has made it available to a general public—a public institution could buy it for no other purposes. Even auctions of manuscripts by their authors or with the author's permission, where the author does not specifically approve or disapprove the actual purchaser, must inevitably include the right to make a general publication unless the terms of the auction specifically forbid sale to a public institution—which they rarely, if ever, do. Thus, any case in which the owner of the literary property offers a manuscript for sale to the highest bidder or for sale to anyone who pays his price, without forbidding sale to a public institution, must be construed in common sense as a general publication. Any public institution which buys or obtains it from the author can not be buying it for anything other than a public use. Thus, when the author permits a public institution to have his manuscript, he is making a general publication.

Stated another way, when the author offers his manuscript to anyone who will take or buy it without specifically refusing its sale to public institutions, he is offering it to public institutions, and this has been held to be a general publication which ends the common law right.

If the owner of the literary property offers the manuscript to a library on condition that it may not be displayed until a certain number of years has passed, he appears to have made a valid reservation, and the public institution, in accepting that reservation, agrees not to make the manuscript available to the general public (i. e., not to publish) until the period of reservation has passed. This type of reservation does not permanently defeat the purpose of the public institution, but rather makes a deferred transfer, which is consum-

mated upon the end of the period agreed to. It amounts to a license to publish at a future date.

A more difficult problem is posed when an unpublished manuscript is offered to a public institution by one who is the owner of the physical object but does not own the literary property. Since the sale or gift of a manuscript to a public institution or offering a manuscript to such an institution is a publication, such an owner would appear not to have the legal right to offer the manuscript to a public institution, since he does not have the right to publish it. Such an act on the part of the owner of the physical object would appear to violate the author's common law right of first publication.

Of course, if a time limit were placed upon the duration of the common law right of first publication, then all transfers to public institutions might be considered conditional. They might be considered to authorize public use fifty years after the death of the author, and not before, unless authorized by the owner of the literary property.

However, in the present state of opinion of the courts on the duration of common law literary property rights, it would appear that the only legal way in which an owner of an unpublished manuscript who does not own the literary property might publicly offer it for sale would be by declaring as a condition of the sale that it might not be transferred to or on behalf of any public institution.

So long as neither of these two measures is in effect, it is difficult to rationalize any justification for transfer of unpublished manuscripts to public institutions by anyone other than the owner of the literary property. Any literary property right may be terminated by a general publication, and this can be effected by giving a copy to a library. Unless it is held that a man who has a perfect right to do anything he likes with a manuscript except publish it may not permit it to become available to a public institution, any letter may be given general publication by giving it to a library. As noted above, legalistic technicalities holding that a general publication can be made only by the owner of the literary property lead only to confusion of facts, and to the allegation that a work made available to the world is not published in the legal sense. This would mean that, if an author gave the second draft of his manuscript to a public library, that copy would be published, while the first draft (a different edition) legally reposing beside the author's gift on the library's shelf as a gift from someone else might, in the legalistic sense, be unpublished.

If a terminal date for the common law right cannot be established, then another means for protecting the right of first publication might be to require notice of all such sales to be published so that the owner of the literary property might have an opportunity to refuse to permit the sale. If, after reasonable public notice that a sale of his literary property is to be held, the author or his heirs do not object, the law might hold that he has dedicated his writing to the public.

On the other hand, so long as the state of the law appears to deny the right to publish to all except the owner of the literary property, and, even in those cases in which a deferred date for public use is agreed upon, a manuscript can be of no value to a public institution except for public use immediately or at an authorized future date. There would appear to be nothing a public institution could conceivably do with a manuscript which is not a public use (or publication). Thus, it appears questionable whether a public institution has the right to buy or accept an unpublished manuscript unaccompanied by the right to publish immediately or at a specified date. Since no one but the author may authorize publication, the very act of accepting the manuscript without publication rights may be a violation of common law rights.

Scholarly institutions have been concerned about their right to exhibit manuscripts or to make photographic copies of them. The real issue may be, and appears to be, whether they have any right to own the manuscript unless they also have the right to use it publicly.

Nor would the theory of limited publication apply. Some libraries have attempted to justify use or exhibit of unpublished manuscripts on this ground. However, that would appear to offer no defense at all and, when challenged, has not been defended. The right to make a limited publication, even if a public display which makes the manuscript available to the world could be held to be "limited publication," is a part of the common law right of authors. No court has ruled that anyone other than the owner of the literary property could make a "limited publication." The fact that no copies are multiplied might possibly be a defense in statutory copyright but has no significance in common law which is confined to the first publication.

Unless the library is authorized to publish, it is not authorized to make any public use of unpublished material, since the very act of

the public institution in accepting the manuscript makes it available where it might be seen and enjoyed by any one or more members of the general public and thus violates the sole right of the owner of the literary property to make the first public use. If the public institution does not have the right to possess the manuscript in the first place, it is difficult to see how it may make any kind of use of it. And since public uses are not covered by common law, and "limited publication" is by definition an act by the author which does not result in a general publication such as to terminate his common law right of first general publication, the possibility of making a limited private use, whether by the author or by anyone else, terminates with the termination of the common law right upon which it depends.

Except for communications dealing with the internal operations of the public institution, which constitute private communications and are not ordinarily made available to the general public, there would appear to be no use of unpublished manuscripts by a public institution that can be considered private.

Thus, under the law as now interpreted, the only conditions under which a public institution may legally possess an unpublished manuscript are (a) when the manuscript is conveyed to the institution with the literary property rights, or (b) when the manuscript is conveyed to the institution by the owner of the literary property with deferred right to publish. In this latter case, the material does not, in effect, become available for any public use and does not really become the property of the institution until the time agreed upon elapses. It might be put in a place to which there is no access by anyone, and the act of making it available to the public would not take place until the time authorized by the owner of the literary property.

This is a somewhat different case than the acquisition of a manuscript from one who does not have the right to authorize public use at any time. In this latter case, so long as literary property in unpublished manuscripts is held to last forever, the public institution will never have the right to use it; and, lacking an agreement with the owner of the literary property, its very possession of the manuscript will be an unauthorized publication. Unless permission of the owner of the literary property be obtained, no use could ever be made of it, and there would be no justification for having it in a public institution under any circumstances. As a matter of fact, libraries and other

public institutions do not obtain manuscripts just to lock them up forever, away from public access. They may set restrictions as to access to these manuscripts, yet it is the literary property owner rather than another who has the sole right of limited publication, and such rules laid down by the institution merely result in its selection of a segment of the public who may make public use. There would appear to be nothing in the common law to permit another than the owner of the common law right to make a "restricted publication."

One actual occurrence will serve to illustrate that the above cases are not purely theoretical. The persons and institution involved will not be identified.

A public institution made single photostat copies of a group of manuscript letters written by a famous, deceased person. The person with whose permission the copies were made owned the manuscript but did not own the literary property and could not transfer the right to publish; in fact, nothing was said about the literary property rights in the transaction. The heirs of the author, who owned the literary property, upon learning of the transaction, served notice upon the institution that use of the manuscripts would constitute a publication and would violate the common law literary property rights of the heirs. They offered to purchase the manuscripts from the institution. The institution refused to sell. The attorneys for the owners of the literary property then notified the institution that any use of the manuscript by the institution would constitute an infringement of the literary property rights and threatened to bring suit unless the manuscript were removed from the public institution. Upon advice of counsel, the public institution decided that they need not give or sell the manuscripts in question to the owners of the literary property. At a later date, however, the President of the Board of Trustees of the institution ordered that the copies be turned over to the complainants, reversing the decision of the library's legal adviser, thus removing important historical material from possible use by scholars.

It is rather difficult to foretell what would have happened if the case had been brought to trial. Since the courts have ruled in other cases that offering a work to a public institution publishes it, they might have held that both the seller and the institution violated the common law right by the very act of offering and accepting the manuscripts in this case. It might have been ruled that the fact of

use was immaterial and that mere possession of the manuscript by a public institution was a general publication. Or the court might have taken a technical position and might have ruled that the library had the right to own the paper and ink and to make any use of it short of printing or publishing it in that sense, since only the author can make a general publication in the legal sense of that term, and the act of another would not, theoretically, constitute a general publication and could not terminate the author's right to make the first publication. In that case the institution could exhibit its property or let anyone use it. Also, since this is a matter of common law and not statute, and since there was no diversity of citizenship, the case would be handled by the courts of the state, and the conclusion reached might depend more upon the location of the case and the experience of the state courts in common law literary property cases than upon any general rule.

It appears fairly clear that, when a public institution obtains an unpublished manuscript from the owner of the literary property involved, the acquisition of the manuscript, or even the offer of the manuscript without limitation as to purchase by public institutions, constitutes a legal general publication and terminates the common law literary property right.

There is considerable question as to whether a public institution may legally accept a manuscript under any conditions from someone other than the owner of the literary property, since such a transfer cannot include the right to make any public use, and possession of the manuscript by a public institution must inevitably dedicate it to public use. Until this question is settled, there would appear to be little point in discussing what uses a public institution may legally make of such manuscripts—since it may well be that they may not legally have them at all. If this is the case, and it seems probable, then public institutions have been violating literary property rights wholesale for many years, and it is doubtful that any library is quite free of this abuse of private property.

The most sensible approach appears to be to limit the duration of the common law right. If this were done, then any public institution which acquires an unpublished manuscript from someone other than the owner of the literary property would automatically store it and not use it for any purpose until the common law right

expires. Other approaches appear possible, but they are more complex and no more satisfactory.

Theses

Another field in which the work of scholarly institutions impinges upon the common law literary property right is the field of theses and dissertations. The rules of scholarly institutions generally require that copies be filed in the institution, usually in the library. This brings up the same question as that noted above. However, there is the additional question as to whether these copies may be protected otherwise than by statute. This can not be done after publication, and it would appear that, unless the steps required by statute are taken, the right to control future publication is lost. Restrictions placed upon use by the institution vary, but, since the institution is not the author nor is it the proprietor of a valid copyright, these restrictions appear to have no standing in the law, and there appears to be no justification for them.

Some institutions appear not to have the slightest understanding of literary property rights, yet assert very positively their right to control the use of manuscript theses. One of the more curious cases encountered was one in which a manuscript was freely loaned to anyone who requested it, but it carried a statement that permission to copy must be obtained from the head of the department in which the work was done. A letter to the head of the department asking permission to make a copy brought the reply that permission was refused on the grounds that the thesis in question was of such little value and was so poorly done that there was really no point in making a copy of it. The rights of the author were not considered at all. The reply was not based upon the right to copy or upon any other common law literary property rights. A person who was not the author or proprietor, and who was ignorant of the rights involved, presumed to give or deny permission to copy. The scholar who copies, based upon such permission, might find, if the common law right has not been lost, that, despite such permission given with assurance and the cloak of authority, he has in fact infringed the common law rights of the author and is answerable to the author.

The policy of educational institutions in permitting or restricting the use of manuscript theses and dissertations varies widely. A study

made by Professor Carl H. Melinat¹ of the restrictions observed by various types of libraries in lending uncopyrighted manuscript theses gave the following results: (it should be noted that some of the answers partially duplicate others so that the percentages will not equal 100.)

In the case of university and research libraries, he found that thirty-two per cent impose no restrictions; all lend theses; only six per cent obtain the consent of the author before lending a thesis; twenty-four per cent require the user to sign a statement of use and include with the thesis a statement of the limitations of using uncopyrighted material; and two per cent do not lend for one year without the author's consent.

Of the college libraries studied, thirteen per cent had no theses; forty-seven per cent observe no special restrictions; seventeen per cent never lend theses; seven per cent include a statement of the limitations of using uncopyrighted material; and three per cent require that the user sign a statement of use.

Sixty-five per cent of the public libraries had no uncopyrighted manuscript theses; twenty per cent impose no special restrictions; five per cent never lend them; and ten per cent lend them if they have duplicate copies only.

Only five per cent of all the libraries studied consult the owner of the literary property rights. Thus, even assuming that the common law right still subsists in these theses (which is probably not true), only one library in twenty could give proper authorization for use of such material. The other ninety-five per cent, since they do not own the literary property, even if it still exists, would appear to have no more right to permit or deny access or copying than would any other of the 150 million people in the United States, who, like the institution, are neither the author nor the proprietor of the literary property involved.

Since the author must consent to the deposit of copies of his thesis in the institution, it appears that in all except five per cent of the cases, in which he is consulted, and the six per cent of the institutions which never lend theses, he has unquestionably lost his

¹Carl H. Melinat. The administration of interlibrary loans in American libraries. Unpublished Master's thesis. Graduate School, Syracuse University, 1949.

common law literary property. Even in these eleven per cent, the copy being deposited in a place where it can be consulted by the public, with the author's permission, the manuscript thesis has been published and has lost its common law protection.

The complex and varied "house rules" laid down by scholarly institutions would appear to have no standing in common law or statute. The only means by which the author of a thesis may be certain that his literary property will be protected is by compliance with the simple requirements of the statute. The courts have held consistently that, after a general publication has taken place, the only protection resided in compliance with the Copyright Statute, and that, failing to comply with the statute, the author cannot protect his work by any other means after a publication has taken place. So long as there is great probability—despite any restrictions imposed by the institution—that a publication does take place merely by deposit in a place in which the manuscript is made available to a general group, universities and other scholarly institutions might wisely give up their complex and burdensome rules. Students should be advised that, if they wish to protect their literary property, they should comply with the statutory requirements by making a general publication, with notice, as required by the act. Since deposit in a public place by the author appears to be a general publication, it seems that all that is required fully to protect the copyright in theses is to include the statutory notice on the title page or on the page after the title page, and in some cases, to deposit a copy with the Register of Copyright if copies are not reproduced for sale.

Statutory copyright may be infringed by scholarly institutions in a number of ways if the court decisions on somewhat similar uses apply.

Recompiling

For instance, in the case of *National Geographic v. Classified Geographic* (125), recompiling was held to be a violation of copyright. In this case the Classified Geographic Company sold parts of copies of the National Geographic, which they had a right to do as the courts have ruled that sale of second-hand copies is a right of purchasers. They bound these parts into volumes, which they had a right to do, since the courts have held that the purchaser may bind and preserve copyrighted material which he has lawfully obtained. However, they grouped the articles taken from various volumes into

subject volumes before binding and selling them, and the court held that this was a violation of the rights of the copyright proprietor. They could unquestionably sell each of the sheets of each volume they owned as second-hand sheets, so the only basis on which this judgment may possibly be justified is the reservation to the copyright owner of the right to recompile.

A number of other factors appeared to help the court reach its conclusion that compiling violates the rights of the copyright owner and that rearrangement of the parts was such a recompilation, even when there was no reprinting. It is difficult, therefore, to foresee what would have happened if the case had been appealed to higher authority.

As this decision stands, any library which binds a number of copyrighted pamphlets into one volume, and this is quite commonly done, might be guilty of recompiling, and would be violating the rights of all the copyright proprietors involved. This should involve libraries in a very sizeable number of law suits if the copyright owners ever get around to it.

However, as noted above, this is the only case on record in which recompiling or rearranging has been held to be a violation of copyright where no reproduction of copies is involved. In this case there was a commercial interest involved. The defendants were selling the recompilation for profit. As noted above in several other areas, there may be a difference between use for commercial purposes and use for non-commercial purposes. In the centuries during which libraries have regrouped materials, and certainly in the period of operation of copyright statutes in the United States, no library has been sued for recompiling because they grouped several different copyrighted works into one volume.

Replacement of Pages

A somewhat more serious problem is the insertion of typewritten or photostat pages to replace missing pages. This is done on a very large scale by almost all types of libraries, and it has been termed an infringement by the courts in several cases. Here again, the cases at issue involved, sale of the copies so repaired, i. e., a commercial rather than a non-profit purpose, so that the same rule probably would not apply.

The important point about both the above questions is not the question of whether libraries will be sued. Rather, they indicate

how confused interpretation of the law may be and has been in certain cases because the statute fails clearly to state what it is intended to protect and how.

Libraries, like other users, have the right to keep their books in good repair and to rebind them; they may lend them or cut them up or give them away. And, except for the fact that a library cannot ordinarily make any private use, because what it does it is doing for a public, it can make any use which does not amount to violation of the limited exclusive right to public uses which is granted to the copyright proprietor by the Statute.

Copying Services

The field in which copyright has been of greatest concern to scholarly institutions, including libraries, is the field of facsimile reproduction by microfilm, photostat, etc.

Some photographic multiplication of copies by scholarly institutions is unquestionably a violation of the exclusive right granted to authors by copyright. The growing tendency of college libraries to produce multiple copies in photoprint in order to supply large classes of students with assigned readings, constitutes multiplication of copies (plural) for a general public purpose. There appears to be no justification for this kind of copying so long as the material copied is available from the copyright proprietor. If only a few pages are reproduced in such editions and the publisher cannot supply just the parts wanted, it may be more economical and better to use photoprints, but that should be conditioned upon permission from the copyright owner and possibly the payment of a suitable fee. This type of use differs from single-copy reproduction on behalf of others. The time required to obtain permission is not a serious matter, since such reading lists are or can be prepared months ahead of their use. Other scholarly institutions, government agencies, and private firms quite commonly multiply copies (plural) for distribution within the organization. This type of copying is difficult to restrain. Nevertheless, it appears to be specifically interdicted by the Copyright Act if the material so multiplied is protected by copyright.

It would appear to be a safe and fair rule that multiplication of a plurality of copies at one time on one order or request is beyond the limits of strictly private use by one person, and thus is unfair competition with the copyright proprietor if the copyright proprietor is willing and able to supply the copies required. Any such reproduc-

tion of multiple copies by any means (even by writing by hand on sheets of paper interleaved with carbon paper, or on a typewriter) should be considered an infringing use if the material is copyrighted, unless the proprietor assents to such use or unless the proprietor is not able to supply copies. In the latter case, reproduction of a limited number of copies at one time should be considered to be permitted under the right to access and should be considered fair use.

Some other categories of infringing photographic reproduction appear to be cases of unsound administrative judgment rather than violations of the Copyright Statute, although the latter may enter into the matter. Few libraries or other scholarly institutions will purchase microfilm or photostat copies of ordinary books which are in print and can be obtained from the publisher at the usual prices. Microfilm is rarely, if ever, cheaper than trade books, even in first cost, and photostats are always more expensive and bulkier. In addition, use of microfilm requires special and expensive equipment and wastes the scholar's time.

As noted above, if total costs are considered, there appears to be no method of single-copy production which can compete in cost with edition production which is reserved to the copyright proprietor. It is doubtful that it will ever be more economical to produce a single copy by any means which cannot be used to produce editions at less cost. Thus there would appear to be no reason in common sense to fear competition from single-copy reproduction, and this is said in full consideration of the claims of enthusiasts for microfilm and microcards and other reduction processes.

The right of libraries to make single copies of extracts, or even of whole works, as the agents of scholars, who have the right to make such single copies for their own use, seems quite clear. There appears to be little question that a scholar may manually take a copy for his own use of any part of any work which he wants to copy. There seems to be little question that he can hire an agent to do that for him (i. e., the right to have one's secretary make a copy has been recognized specifically) and it is difficult to see how lawyers and judges, in particular, could work if they did not have the right to do through an agent what they are entitled to do themselves. Furthermore, it appears that the agent need not necessarily be working without profit. The stenographer who copies for her employer profits therefrom, and having a commercial photostat studio make a copy, at less cost to the

scholar than having someone copy it manually, would appear to be covered by the law of agency just as adequately whether the photostat operator made a profit or a loss.

If helping the scholar to make a copy by supplying him with a table to write on, paper to write on and ink or pencil to write with is not a violation of copyright, then it is difficult to see how making available someone who acts for the scholar as a public stenographer is any more of a violation, regardless of the technique used in making the copy. If affording the scholar any help at all in his copying is a violation of copyright, then the common practice of selling ink from ink dispensers at a penny per fountain pen full is a violation of copyright for profit.

The lengths to which this could be carried are obviously absurd. However, the lengths to which fallacious interpretations of copyright law are now carried by various libraries and scholarly institutions are a deterrent to research. So long as any library refuses, because of lack of clarity in the law, to copy an extract of a copyrighted work for a scholar who may, if he could afford to spend the time and money, come to that library and copy it himself, that refusal acts as a deterrent to the advancement of learning. Every scholar cannot buy every work and should not have to buy every work ever published. There are many works which contain only a page or two which are pertinent to his study. He does not have to buy the book to have access to it in the Library of Congress or in any other library. He can copy what he needs for his own use, quite independently of any law. The copyright law says nothing about this kind of private use and does not prevent it. And, what he may do himself he may do through another.

This is quite different from the use the scholar may later make of that material. If he should use it for a public use, i. e., in a publication of his own, then the doctrine of fair use would determine whether or not he has infringed the copyright. But what he may do later under the doctrine of fair use in the way of republication is quite a different matter from what he may do in copying either by himself or through an agent. They have nothing to do with each other. The former, fair use, is governed by statute; the latter, copying for one's own private use, is outside any statute and requires no permission from anyone. There is no case on record of a court

having declared copying by a scholar for his own use, or copying for him by an agent, to be within the scope of either common law literary property rights or copyright.

Publishers have themselves fairly generally recognized the right of libraries and other scholarly institutions to act as agents for scholars and to prepare single extract copies for scholars.

The gentlemen's agreement entered into between the Joint Committee on Materials for Research and the Board of Directors of the National Association of Book Publishers was reported in the *Library Journal* for October 1, 1935, as follows:

THE JOINT COMMITTEE on Materials for Research and the Board of Directors of the National Association of Book Publishers, after conferring on the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction, have agreed upon the following statement:

A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research; provided

- (1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;
- (2) That such reproduction is made and furnished without profit to itself by the institution making it.

The exemption from liability of the library, archives office or museum herein provided for shall extend to every officer, agent or employee of such institution and the making and delivery of such reproduction when acting within the scope of his authority of employment. This exemption for the institution itself carries with it a responsibility to see that library employees caution patrons against the misuse of copyright material reproduced photographically.

Under the law of copyright, authors or their agents are assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work," all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means, mimeograph or other methods of reproduction a page or any part of a book without

the written permission of the owner of the copyright. Society, by law, grants this exclusive right for a term of years in the belief that such exclusive control of creative work is necessary to encourage authorship and scholarship.

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest.

The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.

In order to guard against any possible infringement of copyright, however, libraries, archives offices and museums should require each applicant for photo-mechanical reproductions of material to assume full responsibility for such copying, and by his signature to a form printed for the purpose assure the institution that the duplicate being made for him is for his personal use only and it to relieve him of the task of transcription. The form should clearly indicate to the applicant that he is obligated under the law not to use the material thus copied from books for any further reproduction without the express permission of the copyright owner.

It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photocopying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted. In case of doubt as to whether the excerpt requested complies with this condition, the safe thing to do is to defer action until the owner of the copyright has approved the reproduction.

Out-of-print books should likewise be reproduced only with permission, even if this reproduction is solely for the use of the institution making it and not for sale.

This statement of policy indicates recognition by the majority of book publishers of the United States that libraries making an extract on specific request of a scholar for his private use do not infringe copyright, but rather are agents, doing for the scholar what he has a right to do for himself. Similar statements may be found in the

Minutes of the Annual Meeting of the Honorary Consultants to the Army Medical Library (200) and in other sources. The "Gentlemen's Agreement," however, was not subscribed to by all publishers, so that it is not always possible to tell whether the publisher of a work in hand, of which copying is requested, agrees, and the administration of such copying service, which even the publishers fairly generally agree is a legitimate service and does not infringe, is difficult. The only real solution is recognition of the difference between private use and public use, leading to clear recognition of the fact that such arrangements as the "Gentlemen's agreement," valuable as it is in indicating the attitude of a group of publishers, has no standing in the law. It deals with something that is not covered by the law and which the publishers or copyright owners have no right under the Copyright Law to interdict. Furthermore, unless the publisher happens to be the copyright owner of the book he publishes or has the right to act as agent for all the copyright owners for whom he acts as publisher, this authorization is meaningless. If publisher A, who is included in the group of publishers who agree to the above statement, publishes a book by author B and the book is copyrighted in author B's name, unless B has authorized the publisher to speak for him, author B will be the only one who may grant permission or bring suit and publisher A's blanket permission would not provide protection.

A careful reading of the "Gentlemen's Agreement" indicates a number of claims on the part of publishers which do not appear to be borne out by the grant of monopoly actually given by copyright.

Thus the answer to legitimacy of copying services must be based on the terms and intent of the law and not upon any extensions of the law, no matter how generous, by persons who do not have the authority to make the interpretations. Only the Congress and the courts can tell what the law covers, and neither of these have indicated that the author or copyright proprietor have any right to limit strictly private uses in any way. Such strictly private uses should not be restricted or hampered unless it can be demonstrated that they are governed by the copyright act or by any other law, and that compliance with such law requires this added red tape, cost, and waste of the scholar's time.

As stated in the "Gentlemen's Agreement," "... a student has always been free to 'copy' by hand; and mechanical reproductions from copyright material are presumably intended to take the place of

hand transcriptions, and to be governed by the same principles governing hand transcription."

If the owners of copyrighted literary property have any rights with respect to the private uses of their copyrighted material, they should establish those rights either in the law or at least by adequate court decisions. If they can establish such rights (which do not appear to exist at present), they should establish a means by which the petty cash amounts involved, pennies in most cases, can be collected automatically and without undue interference with the work of scholars or with the advancement of science. Possibly some plan like the ASCAP arrangement might be the way to do that, if it is to be done.

Even if such new rights can be established, they would be the rights of copyright proprietors and not of others, and anyone who is not the owner of the literary property should not be permitted to interfere in this field and to confuse the parties actually concerned by what can be no more than bluffing and bullying, since one who is not owner of the literary property could not bring a suit under the Copyright Act even if an infringement should occur.

Until the right claimed to restrict strictly private uses in any way is clearly demonstrated, there appears to be no justification for interference by anyone in the scholar's right to make any use of copyrighted material which is not specifically reserved to the copyright proprietor by the statute. There appears to be no monopoly granted to authors by the statute with respect to the making of a single copy by or on behalf of a scholar for a strictly private use—in fact the court decisions to date clearly indicate that such private use is outside the scope of the statute.

Summary

1. Placing a copy of an unpublished manuscript in a public place, such as a public office or a library, is a general publication.
2. If the action offering to or placing the manuscript in a library is done with the consent of the author, that almost unquestionably constitutes a general publication which results in the termination of the common law literary property right of first general publication, and, if the copyright statute is not complied with, places the publication in the public domain.

3. If the manuscript is offered to or placed in a public institution by someone other than the owner of the literary property, that probably constitutes a violation of the literary property rights.

4. Unless the right of a library to own a manuscript and, inevitably, to make any public use of it without the consent of the owner of the literary property can be established, it would appear that libraries violate common law literary property rights by accepting unpublished manuscripts from anyone other than the owner of the literary property, unless they are accompanied by authority to publish.

5. A transfer of a manuscript by the owner of the literary property to a public institution with a specific reservation as to the time which is to elapse before public use is to be made of it should be construed as a limited transfer which sets a date for general publication at which time the public institution will be able to make public uses of the manuscript.

6. Unless the manuscript is obtained with the authorization of the owner of the literary property to use it immediately or at some predetermined later date, it would appear to be of no use whatsoever to a public institution; and, unless a predetermined date can be established either by contract or by a law limiting the duration of the common law right, manuscripts could serve no legally permissible purpose in a public institution. Thus, the acquisition of such manuscripts would appear to be for no other purpose than for the invasion of the rights of owners of the common law literary property.

7. There is confusion between the legal concept of "general publication" which presumably requires the consent of the author, and the fact of general publication which may make a manuscript available to any and all members of the general public without the author's consent and without being held by the courts to terminate the author's right of first general publication. Until this is clarified in the law there will be no sensible basis for determining what is protected and what is not, or what the status of any manuscript in any public institution may be.

8. Common law literary property rights should be defined, and a termination date for these rights must be set if scholars and scholarly institutions are not to be permanently restrained from advancing learning by use of records of past eras or are not continually to violate common law literary property rights.

9. The common law literary property right, particularly with relation to the use of materials by scholarly institutions, is integrally interwoven with statutory copyright. It may be confused because it is generally administered by any state court, and the federal courts, in some cases, claim jurisdiction. This confusion will not be removed until the common law right is defined uniformly by a federal statute covering all literary property rights, whether they be the right of first publication, or the rights dependent upon this to multiply copies after the first general publication has been made.

10. While statutory copyright may impinge upon the work of scholarly institutions in many ways, it appears that such imposition of restrictions as may have been effected have been effected by threats of action, by alleged rights asserted by authors or others, or by misinterpretation of the statute by the heads of scholarly institutions. There is no record of a library or other scholarly institution having been sued and found guilty of infringement of copyright on any grounds.

11. Such restrictions as have been placed upon the use of either manuscript or copyrighted materials because of interpretation by the head of the library or other scholarly institution appear in general neither to protect the author if the right does exist, nor to protect the institution from action for alleged infringement. They appear merely to make the work of the scholar more difficult because of the ignorance of the administrators of scholarly institutions of the rights of scholars in re literary property. In view of the confused and complex pattern of law and decisions, this ignorance is understandable and excusable; yet so long as it endures, institutions which should be facilitating the work of scholars will be hindering it.

12. Scholarly institutions infringe the copyright law when they prepare multiple copies of copyrighted materials for public uses without permission. This type of copying should be discontinued.

13. Scholarly institutions may, in the present state of decisions, be infringing copyright when they type or otherwise reproduce a missing page of a copyrighted book for their own collections, since this is for a public use; however, there are no court decisions interdicting this type of copying when it is not done for profit.

14. A scholar has the right to make a copy of any material to which he has access for his own use and has the right to have the same done for him by an agent. Thus, library photocopying services,

insofar as they merely supply the material requested by a scholar in a single copy for his own use, are acting as agents to do for the scholar what he may legally do for himself or may have any agent do for him. This is not a violation of any law at all. If the scholar later makes a publication of any part or all of the copyrighted material, he would have to justify that under the principle of fair use, but it does not matter whether he makes such a public use from an original, or from a copy which he has prepared or has had prepared for his private use. The two are different operations. The public use by the scholar is unquestionably governed by statute. The private transcription by the scholar or on his behalf is not governed by copyright or by any other law. Thus, requirements for permission, or other devices which hamper the scholar's access to published material for his own study, appear to be an unjustifiable interference with the advancement of learning.

15. Scholarly institutions should use common sense in recommending, supplying or using photographic copies of copyrighted materials when in fact the available printed work is more economical to buy and use. If this is done, copyright proprietors would have little to fear from copying services in scholarly institutions.

16. Persons who are not the author or who cannot show that they derive authority from the author to control the use of copyrighted materials should stop asserting rights to control the use of copyrighted material which they do not in fact possess.

CHAPTER XIX

Conclusions

Nature and Scope of Literary Property

Our patchwork pattern of protection of literary property has evolved from a social pattern which no longer completely applies. No fundamental revision of the protection of literary property has been undertaken for more than one hundred years, and such modifications of the Copyright Act as have been made have added new protection to some types of material for special types of use, thus further complicating the field.

The common law literary property right and statutory copyright are different yet are closely related. The latter depends on the former and cannot exist if there was no valid common law right; yet decisions on the existence of a common law right are made by state courts, federal courts or both. On the theory that the common law right is outside the statute and that where there is no diversity of citizenship it is a state concern, federal courts are generally prevented from hearing such cases; yet, when a federal court feels that the result will affect an interest under statute (as it must inevitably do, since statutory copyright may not be obtained except on the basis of valid common law rights), the federal court may claim jurisdiction (and has done so in some cases) reversing the findings of the state courts.

The state of the law has been further confused by non-uniform decisions in district courts; and, in most cases, since the amounts involved are small, these decisions stand and are not appealed to higher authority for more uniform interpretation. The courts do not, furthermore, appear to follow precedent established even by the Supreme Court in all cases and appear either to follow the statute very rigidly or to leaven it very liberally, depending upon other factors in the case—which, while they may call for remedy, should probably seek that remedy in other laws; and frequently the courts appear to confuse the rights of publishers—which have no existence as such under the statute—with rights of authors.

One can rarely tell with certainty which of the many possible positions a court may take in copyright dispute—and in view of the amounts generally involved both contestants might, in many cases, be better off if they tossed a coin for the decision.

The principal sources of confusion appear to reside in the fact that nowhere do we have a clear and authoritative statement of what literary property is; what is to be protected; for whom; why; and how.

It would appear desirable, therefore, to restudy our literary property acts and the common law and to redesign them to achieve whatever it is that is intended to be achieved—defining the terms, and legislating clearly enough so that the objects can be achieved simply enough to provide protection to all concerned.

Nature of literary property.—Literary property is intangible property. Both common law and statute deal solely with the right to make public uses of a particular concrete form of presentation. They do not govern physical objects portraying the literary property nor do they cover the ideas or facts contained in the author's presentation. If this is borne constantly in mind, much of the confusion about literary property should be eliminated.

The common law literary property right is merely the right to make the first public use. All other rights are derived from this one. While the courts allege that the common law right permits the author to prevent others from making public use, and technically speaking that is correct in the sense that the author has been able to restrain persons from making uses recognized by the law as "publication"; nevertheless, if the author permits the manuscript to leave his hand, he does not have the ability or right, in fact, to prevent access to it on the part of any member or members of the general public to whom it may subsequently, and successively, be given or sold. Thus common law literary property rights cannot actually protect the right to privacy as such. It can only protect the right to a use equivalent to a public use insofar as that use potentially or actually exposes the work to a group of people. That is to say, printing and distribution of multiple copies or a public reading of a private letter would be recognized as publication or a public use. But selling or giving the original letter to one person after another, one at a time, is considered a private use of the physical object and not of the literary property. Thus, so far as literary property is concerned, it is in fact, and should

in application of the common law, be confined to the right to make first dissemination to a group of people not personally selected by the author whether that be by printing multiple copies and distributing them, putting it on display in a public place, or presenting it visually, orally or otherwise in any manner which enables any member or members of the general public (i. e., persons not selected personally by the author) to have access to it. The common law literary property rights cannot effectively protect any right other than that of making the first public use, so long as the manuscript's physical property and its literary property are recognized as separate entities.

Statutory copyright and common law literary property are closely related in that sound administration of copyright cannot be effected without taking into consideration the common law status. If the common law right has been lost prior to action to secure statutory protection, there can be no statutory protection. There appears to be no reason why administration of common law rights cannot or should not be made subject to statute, and there are many reasons which indicate that it should. The constitutional basis for copyright includes the common law right if the Congress should decide to enact it into law, provided only that it be protected for a limited time. That would appear, in itself, to be a good reason why the right to make first public use should be covered in the Federal Copyright Act.

Nature of Statutory Copyright.—Statutory Copyright is simply the right of authors who meet the requirements of the act to a monopoly, for a limited period, of public uses of the particular concrete form of presentation of their writings, and the other concrete forms in which they may be used publicly. Like the common law right it does not protect ideas or facts. Nor does it have anything to do with non-public uses.

At present the concrete forms protected appear to vary with the original form of presentation. There appears to be no reason why all copyrighted writings should not be protected against all public use by others in any form in which they may be so used.

While all creations by authors are automatically protected by common law as an incident to their creation, statutory copyright does not accrue automatically. There are many types of writings which are intended by the author for dedication to public use rather than for sale for profit. The common law and statute both recognize the

right of authors to dedicate their works to the public, and by the nature of statutory copyright, since copyright covers only public use subsequent to the first public use, this monopoly may exist only if it will encourage *the further dissemination after first public use*.

Since the right of an author to dedicate is inherent in the nature of the common law and in the statutory copyright, monopoly may not be automatic after the author has in fact dedicated his work. If this were recognized, then the confused and controversial issue of divisibility of copyright would be solved and authors would not have been held to have dedicated in some cases in which they had tried to obtain monopoly; nor would others who have no standing under either common law literary property rights or statutory copyright have been held to hold a monopoly (even against its author) which the author had not intended to convey. Copyright law should not serve as a substitute for the law of contracts, nor is it necessary, in the nature of copyright, for it to conflict with normal contractual relations.

The right of first public use of a particular form of presentation and the right to its exclusive public use after first public use (subject to the principle of fair use) constitute the whole of the literary property right—under either common law or statute.

Failure to protect these rights of authors has resulted from over-extension of literary property rights beyond these bounds, and this has greatly complicated the protection of literary property. On the other hand the public purposes of protection of literary property may be defeated by such over-extension and over-complication of the nature and scope of literary property.

Protection of literary property is considered to be a *right* of authors, at least insofar as the right to first public use is concerned. As noted above, however, the public interest may at times intervene, and the rights of others to make a first public use of literary property may, in unusual cases, supersede the author's right. The right to make first publication, although not an absolute right, may be considered a right of authors. It should, therefore, apply automatically to all "works" of "authors" and should be an absolute right except insofar as it may conflict with important public interests or public rights.

Statutory copyright, or the monopoly of public uses after the first public use, has not, except in a very few court decisions which

were narrow and probably erroneous, been considered an absolute right, or for that matter, a *right* in any degree. Rather, as a creature of statute, governed strictly by the statute, the copyright is in fact a limited franchise granted in the public interest for a limited period and it grants a limited monopoly. Its primary purpose is not the protection of authors, but rather must be the public interest. Protection of authors may be provided under the Constitution only insofar as that aids the progress of the arts and sciences. Thus, in this country, authority to control public use after first publication does not accrue to the author automatically, and it should not do so. If the author wishes to dedicate his work to the public, and many in fact receive no payment for their writings but rather make those writings available to the public without charge, no one not the author ought to be able by copyright monopoly or otherwise to defeat the author's purposes by withdrawing or limiting the public use of the work.

It may be possible further to limit the scope of both the common law right of first public use and the subsequent control of public use after the first public use has been made to those cases in which *direct monetary profit to the author is involved*. There can be little question that this was the basic thing to be protected when the first copyright statute was passed in England. The theory that copyright is justified as a means of protecting the right of any worker to enjoy the fruits of his labors is repeatedly stressed in the discussions of copyright and in court decisions. However, literary property rights have been extended far beyond that purpose. The administration of copyright and of common law literary property rights for the protection of proprietors of composite works rather than authors, even against the interests of authors in some cases, would appear to have broadened the argument that an author is worthy of his hire, to the argument that one who is not the author and who gives no part of the profit to the author is entitled to protection of a right to make money from the work of the author provided only that he has the author's permission to publish. While the courts always speak of the rights of authors, they frequently act on this over-extended concept of the rights of publishers. In every case in which the issue has been brought up specifically, the courts have agreed that the proprietor has no rights other than those granted to him by the author under a contract which is quite independent of rights granted by the Copyright

Act as such. However, in many cases in which the issue is not brought up directly, the courts have protected publishers without inquiring into the rights of the author and have acted as if the proprietor had a right to protection under the concept of literary property. The scope of literary property may not legally be extended beyond the protection of authors. Since any rights others may have must be derived from the right of the author by means of contracts which are quite independent of the basic theory of literary property and are administrable as contracts and not as copyright, it appears quite clear that the scope of literary property must be limited to the right of authors, and no one else, to make direct financial profits from the use of their works, if they want to enjoy such protection. However, if the author dedicates his work to the public, he has no protection of any sort to offer to anyone else under contract. And if the author gives his work to another without asking for or receiving any assurance that he will share in any direct profits which may accrue, he has given away his right to profit and has no right to profit which he may offer to share with anyone else under a contract. Having given his work to the public without profit, the author's right to profit is nonexistent, and it is difficult to see just how a monopoly can protect him in his so-called natural right of the worker to share in the profits from his labors. In such cases, the proprietor of the composite work, who is its corporate author, would still be an author of the work as a whole, even if his literary work is merely arrangement, but he would be protected only as author of the compilation rather than as author of the individual works contained in it in those cases in which the author of the component literary parts has given them away and has thereby abandoned his right to be protected in the right to share in the profit from them.

Objects of Protection of Literary Property

The objects of protection of literary property are public objects. As noted in the discussion of common law rights, there appears to be no way in which literary property can adequately protect the right to privacy or moral rights. The literary property concept of the right to make first public use is not necessary with respect to documents which are never transmitted to anyone else. These are preserved much as trade secrets are preserved. Trade secrets are not protected by patents, and manuscripts which no one is permitted to see, need no protection. The only real protection either trade secrets or manu-

scripts may, in fact, enjoy is the care taken by their owner to avoid divulging them to others. Once control of a trade secret has passed out of the hands of its owner, whether accidentally or otherwise, he may sue for unfair trade practices, possibly, but he has no protection of the secret as such. Similarly, what an author writes is strictly private only so long as he in fact controls it, and it does not get into any other hand. The moment he permits someone else to get hold of the manuscript and to own it, he has no protection against piracy of his ideas by another even if he does have the right to control public use of the form of expression which he has employed. Thus, the concept that one person may own the paper and ink (or other concrete expression) while the other owns the right to make public use shows quite clearly that, when the author has parted with his manuscript, he has given up any hope of keeping the ideas it communicates strictly private, whether the work in question be a personal letter or the manuscript of a book. So long as anyone may own the paper and ink of which the object is composed, everyone may in turn own it, and there is no limit to the number of people who may have access to it without publishing it in the legal sense of that word.

Similarly, the cases cited indicate that the moral right is in direct opposition to many rights of others and our courts have held that the rights of others, i. e., the right of the public to make any use of materials in the public domain, as one example, are of greater importance than the moral rights of authors. Neither the common law nor the statute attempts to protect any literary property rights except those which are affected with a public interest. The common law literary property which the courts have attempted to protect appears to be based upon the concept that the worker merits protection in the enjoyment of the fruits of his labors, but that is conditioned by the concept that the works of authors are labors in the public interest. Thus, neither the common law nor the statute protects labors which are too insignificant in terms of their contribution to knowledge (such as stage business, or sleight-of-hand tricks) nor does it offer protection to any kind of writings of authors which are salacious, pirated, or otherwise counter to the public interest. Both common law and statute apply only insofar as there is a public interest in protection of literary property and the public interest dominates the interests of individuals.

The only two types of right which can, therefore, be included in protection of literary property as such are (1) protection of the right to profit and (2) protection of the right to credit. The former has been recognized as one of the basic objectives of the concept of literary property, but the latter has not only not been recognized, it has been denied by the courts.

Before the enactment of the first federal copyright statute, the several states legislated on the subject of copyright. There appears to be no more valid reason for the Federal Government to legislate with respect to the right to monopoly after the first public use than there is for the Federal Government to legislate in the public interest with respect to the literary property right of first public use, and much confusion could be avoided if the Congress could state in a single act what it is that we intend to protect in these two interdependent types of literary property, making them one. There appears to be nothing in the objects of public recognition of literary property which cannot be adequately provided under the grant of power to the Congress by the Constitution. The Constitution states that Congress shall have the power to promote the progress of science and the useful arts by securing for limited times to authors the exclusive right to their writings. The Constitution does not limit this protection to protection after the first public use has been made, nor does it limit the protection which may be granted to protection of the right to make a direct monetary profit. Protection of the author's right to credit will encourage authors to dedicate, since the right to credit is a powerful motivating force in learned fields, and such a provision should do as much as granting monopoly in encouraging authors to make their writings generally available. Thus, the Congress might well recognize protection of the right to credit as being within the grant of authority to legislate in the field of literary property.

Certainly, the Congress is not empowered to grant any monopoly in this field to anyone other than the author, and the Congress has recognized that fact. However, insertion of the word "proprietor" in the act, which adds nothing to the protection of publishers or authors which is not provided for by a contract, and which has resulted in loss of copyright protection in some cases, confuses the objects of the legislation.

Unless protection of literary property recognizes its nature in the public interest and is designed to make ideas more readily available to the public, there is danger that the literary property laws, both common law and statutory, will defeat the purposes for which they exist. The rights of the public to access to the ideas in works given protection as literary property are of greater importance than the rights of authors, and it is for these rights, rather than for the protection of authors as such, that literary property is recognized.

A model literary property statute should, therefore, define its objects and its terms. It should tell whom it is intended to protect, and what it is that society intends to achieve by recognition and protection of literary property. It should specifically exclude from its scope all matters which must be covered by laws other than literary property laws. It should tell to whom protection is to be afforded, how, why, and for how long. And above all, it should define its terms so that it may provide for administration of the act simply and cheaply enough to provide for petty cash protection for petty cash claims.

Interpretation of the Copyright Act

The major changes in the present act required to effect those ends would appear to be:

A. The objects and scope of protection of literary property might well be outlined as follows:

1. The object of the act is to promote the progress of science and the useful arts.

2. The means by which this object is to be achieved is the provision of incentives to authors which will encourage authors to make their writings most freely available to the general public; any limitations on public use authorized by the act must be the minimum restrictions required to encourage authors to make widest possible dissemination.

3. Since the constitutional objective and objective of this act is *use* of the writings for the advancement of science and the useful arts, nothing in the act should discourage or in any way limit any strictly private use of writings of authors; nor should the concept of literary property be broadened beyond the definition thereof in the act so as to limit the public or private use of ideas or facts contained in writings of authors.

4. The protection granted to authors should be in the nature of a franchise for a limited period, granted to the author in return for his act in making his writing available for public uses.

5. The literary property which is protected by this act is limited to the public use for profit of a concrete form of expression created by an author and its public use for profit in any other form in which it is capable of being so used, and literary property should include also the right of an author to receive credit for that which he has created.

6. The purpose of protection of literary property is use. Limitation of public use shall, therefore, take into consideration the principle of fair use and any use of copyrighted material which cannot be shown to have caused a loss to the author (or those to whom he grants assignments or licenses of part or all of his copyright) of an amount which is unfair should be considered fair use in the public interest under this act. (The amount might be set at ten dollars, and any public use of less than ten per cent of a copyrighted work might be defined as fair use.)

B. Whom does the act protect and to what extent?

1. The authority delegated to the Congress by the Constitution does not permit provision of copyright monopoly to any person other than an author. The term "proprietor" in the act has no constitutional basis and the only way in which any person other than an author may exercise control over public use of a writing is by virtue of a contract with its author and not by any direct grant of franchise under this act. The term "proprietor" actually assumes no value except insofar as the author makes a contractual grant to such other, and its inclusion in the act adds nothing but confusion. This term should be removed from the act and grants of copyright monopolies should clearly be shown by the act to be available to authors only (or if the author is dead, to his heirs).

2. Component parts of composite works may or may not be copyrighted and the notice protecting the work as a whole may not protect any of the component parts as such. The notice should apply only to the whole work covered by the notice.

3. Each component part of composite works should bear its own author's notice of copyright if the author of the part wishes to secure the protection afforded by the act for that part as an entity.

4. The franchise granted by the act should clearly be limited to (a) the author's right to receive credit in any public use of his writing, and (b) in those cases in which the author has direct interest in the financial returns from public use, an exclusive franchise to make any public use for profit.

5. The act should state unequivocally that it does not apply, under any circumstances, to private use of writings of authors.

6. The protection of the right to first public use should, in the public interest, be terminated at a specified time (say fifty years) after the death of the author, and, if the author or his heirs have not made a public use by that time, the statute should declare the writing part of the common heritage of mankind.

7. The purposes of notice should be declared to be (a) to notify the public that the author is reserving the right to make public use for profit, and (b) to notify the public of the period of time for which the exclusive franchise extends. Failure to include such notice in proper form on each writing of each author (whether the writing be issued separately or in a composite work) must, if the notice is to be intelligible in any case, be notice to the public that the author has not chosen to reserve the right to an exclusive franchise and that the writing published without such notice is in the public domain (subject only to the author's right to receive credit in any public use).

8. Confusion with respect to divisibility of copyright should be eliminated by limiting the grant of copyright to authors. Licensees and assigns should be more adequately protected by contracts recorded with the Register of Copyrights.

9. The objective of limiting the possible number of suits might better be effected by requiring recording of all licenses and assignments of a copyright granted to an author (as is the case at present) and permitting anyone who has a recorded contractual interest to bring suit against anyone alleged to infringe that interest, on condition that all other recorded licensees or assigns be given an opportunity to join in such a suit if they believe their part of the franchise to have been invaded. Thus only one action would be brought for one alleged infringement and, if after due notice any licensee or assign failed to indicate that he wished to be a party to the complaint, he would be held to have waived any right he may have had with respect to that particular alleged infringement.

C. *Definition of terms.*—The act should define its terms. The most important terms might be defined as follows in the interpretation and construction of the act:

1. *Literary Property* is intangible property consisting of a franchise to make public use of the writing of an author for credit, for profit, or both.

2. *Public Use* comprises any and all use by which the writing of an author may be made available to be seen, or used, or enjoyed by groups of members of the general public.

3. *General Public* should be construed as any group of persons not all of whom are personally selected by the author.

4. *Author* should include any creator of a "writing" regardless of the form of the "writing," and should include both the individual who creates a writing by himself and the employer who creates a "writing" by having it prepared for hire; the latter may be termed a "corporate author."

5. *Writing* should include any concrete form of presentation of ideas or facts created by an author.

6. *Composite works* are all writings which include the writings of two or more authors.

7. *Copyright* is a franchise granted to an author in the public interest in payment for his act in making his writing available to the general public.

8. *Infringement* is unauthorized public use of the writing of an author which interferes unfairly with the author's exclusive franchise to use his writing publicly for profit. (The determination of unfair use might well be fixed as a public use which interferes with the author's franchise to a certain extent and causes at least a certain, specified loss to the author—say ten dollars, or which copies more than ten per cent of the copyrighted work.)

9. *Copy* means to produce multiple copies at one time or on one order.

10. *Publish* is to offer or to make multiple copies available to the public, or to present the writing visually or orally or otherwise before a group, the members of which are not all personally selected by the author; to put the writing in a public place where members of the general public may see, hear, consult, or have access to it; i.e., to make any public use.

D. *Infringement*.—Infringement, or failure to give credit, should be penalized by a fine as an offense against society, and the adjudication of small claims should be turned over to a judicial officer in the copyright office. The act might read approximately as follows:

1. Infringement: If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable

(a) Penalty.—To a fine of not less than \$50.00 nor more than \$500.00 for making first public use of any manuscript not in the public domain without permission of the author; or a fine of not less than \$25.00 or more than \$100.00 for making any infringing public use after first publication and copyrighting, or for failure to give credit to the author in any public use of a substantial part of his writing.

(b) Injunction.—To an injunction restraining such infringement.

(c) To damages to the extent of the actual loss caused; provided that when the infringement has been profitable, the profits from the infringement shall be the measure of the loss which the author has sustained; provided further that in the case of unauthorized public use of an unpublished manuscript the damage shall be the total value of the literary property.

2. There shall be established under the jurisdiction of the Register of Copyright a Judicial Officer who shall hear and decide all cases of alleged infringement in which the damage is not shown to be in excess of a certain amount (1,000.00 for example) provided that the parties to such hearings shall have the right to be represented by counsel and to appeal such decisions to the Federal Courts.

E. *Fair Use*.—The act should affirm its purposes by spelling out the rights of users of copyrighted materials—including especially their right to access as the minimum return the author must give to the public in payment for his exclusive franchise; the right to make fair public use in accordance with the purposes of publication and protection; and the right to make any use not reserved to the author by the statute.

F. *Fair Dealing with Authors*.—While the concept of literary property should not be broadened to such an extent as to deny to the public the benefits which it is supposed to provide, it should not, on the other hand, be so tricky and confused as effectively to deny to authors the franchise which it purports to grant.

The concept that whatever may superficially appear to be the merits of the case, the copyright franchise must be governed by a statute so complex that its interpretation confuses everybody, even causing division in the Supreme Court, is intolerable. Loss to the

author, on the basis of variable technical construction, of a valuable franchise which is promised to him by the spirit and intent of the statute cheats the author. In such cases society reaps the full benefit of the author's creative work and deprives him of the reward promised to him, solely because of society's failure clearly to grant the franchise it promises.

Much of this difficulty would be overcome by the revisions suggested above. However, in addition, complete revision of the statute is required to simplify it, to eliminate confused and confusing terms such as "vend," "copy," etc., and to provide that, when the author makes public use for profit and indicates his option to receive protection by proper notice and by compliance with such other simple requirements as may be absolutely essential he will receive full protection of the franchise granted to him to make exclusive public use for profit, in any way, for the statutory period.

The franchise so given would generally be a fraud if the author is not permitted to grant valid and enforceable licenses or assignments; and such contractual grants, made separately from the author's compliance with the requirements for copyrighting, should never be the excuse for invalidating the basic franchise granted to the author. Any person receiving a valid license or assignment from the author should not be prevented from protecting that property, and, as noted above, a mechanism is available to achieve that end without permitting multiple suits for one infringement.

Unless the publisher, without whose services the objects of protection of literary property cannot in fact be achieved, is enabled to secure a valid and enforceable property right, authors will have very limited means for giving their writing to the public, and the objects of copyright will be defeated. And these delegated, contractual rights in the franchise, too, should be freed from unnecessary technicalities.

The statute should be revised:

1. To grant copyright to authors only.
2. To eliminate all unnecessary and non-discrete terms.
3. To provide a franchise for all public use when the author complies with the requirements of the statute and makes his first public use for profit, and to eliminate the confusion resulting from specialized protection for differing types of public use, depending upon the original form in which the writing is made public.

4. To protect the right of authors to receive credit for their writings.

5. To reduce the statutory requirements for obtaining protection to the minimum required to achieve the objects of copyright and to state these simply and clearly.

6. To provide for simpler adjudication of small claims.

7. To recognize the right of those granted an interest in the author's copyright to protect that interest; and

8. To provide for federal responsibility for enforcement of its grant of franchise, and for federal penalties in the form of fines for infringement, whether the infringing public use is intentional or not. This should make it necessary for the Federal Government to enforce the franchise granted to authors, and to place the burden of proving infringement upon the Government.

Part II

Citations

1. "I have not the slightest difficulty in my own mind, that a lecturer may say to those who hear him—'You are entitled to take notes for your own use, and to use them, perhaps, in every way, except for the purpose of printing them for profit; you are not to buy my lectures to sell again; you come here to hear them for your own use, and for your own use you may take notes.' In the case of Lord Clarendon's work, the history was lent to a person, and an application was made for an injunction to stay the publication; it was said there, that there was no ground for the injunction; and it was proved on affidavit that my Lord Clarendon's son said, 'There is the book, and make what use you please of it'; the Chancellor however of that day said, 'that he could not mean he was to print it for his profit.'" *Abernethy v. Hutchinson*. L.J. 3: 217, *Cases in Chancery*. 1825.

2. "Permitting use of portions of a copyright book without copyright notice voids copyright of the portions so used." *Advertisers Exchange v. Anderson*. 52 F. S. 809 COB 24: 13. 1943.

3. "... lack of intention to infringe does not release ... from liability." *Advertisers Exchange v. Laufe*. COB 22: 11. 1938.

4. "The only conclusion of law to which it is possible to come is that plaintiff, by furnishing matrices to defendant, upon which matrices there was no notice of copyright (that is, no legible notice) to be published in newspapers ... without any notice of any claim of copyright, dedicated the subject matter thereof to public use. Thereafter any person, including the defendant, was privileged freely to use such matter so dedicated to public use ..." *Advertising Exchange v. Witten*. 50 F. S. 137 COB 24: 19. 1942.

5. p. 829 "... the copyright is not void because of inclusion ... of uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it. . . ."

p. 833 "Publication of an intellectual production without copyrighting

it causes the work to fall into the public domain. It becomes by such publication dedicated to the public, and any person is thereafter entitled to publish it for his own benefit."

p. 834. "If one takes matter which lies in the public domain, or which has been dedicated to the public by publication without securing copyright under the acts of Congress, and, adding thereto materials which are the result of his own efforts, publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work. See *Dicks v. Brooks*, L.R. 15, Ch. Div. 22."

"... an American publisher of the piratical production cannot secure the fruits of his piracy by taking out a copyright under the copyright act..." *American Code v. Bensinger*. (CCA 2) 282 F. 829, 833, 834 COB 19:16. 1922.

6. "It has been held that the words 'copy publish, print . . . vend,' in the copyright law are all clearly intended to be covered by the word 'publish.' *Fitch v. Young*, 230 F 743. Publication means to issue copies to the public. Delivery of copies here was publication of a kind but we can see in it no derogation of the plaintiff's copyright." *Am. Inst. Architects v. Fenichel*. 41 F.S. 146 COB 24: 45. 1941

7. "In this country it is well settled that property in copyright is the creation of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in Art. I, § 8, 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' see *Wheaton v. Peters*, 8 Pet. 591, supra; *Banks v. Manchester*, 128 U.S. 244, 252; *Thompson v. Hubbard*, 131 U.S. 123, 151."

"Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These

statutes should be given a fair and reasonable construction with a view to effecting such purpose.

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

"It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained." *Am. Tobacco v. Werckmeister*. 207 U.S., 293, 1907.

8. "' . . . there is the public interest in having subsequent workers in a field allowed to make use of the accumulated knowledge of the past, especially knowledge of the sources . . .'

"A text-book differs fundamentally from a compilation, such as a directory or list. The latter simply sets forth names, symbols, or the like; its only usefulness lies in its presentation of facts which any one might have learned by repeating the compiler's industry, and which, having learned, he could present to the public practically in only the one way. The former is the product of intellectual labor and literary skill, results of which are unique each time the subject is handled independently, even though the same materials are dealt with. Moreover, in a text book there is ordinarily a critical discussion of earlier writers and a re-examination of their sources. Again, the directory or list is intended to be used as a guide to something further and different; it is not in itself a contribution to knowledge; which is availed of by co-workers in the same field . . . greater latitude is to be expected in the cases of authors consulting other text-books or using directories and lists than in the case of one compiler attempting to make use of another similar compilation." *W. H. Anderson Co. v. Baldwin Law Pub. Co.* 27 F2 89 (CCA 6) COB 20: 24, 25. 1928.

9. p. 28. "Copyright covers only what is original, when map on which copyright was obtained was substantially a copy of a map in the public domain, no infringement resulted from copying the copy-

righted map." *Andrews v. Guenther*. 60 F2 555 COB 20: 28. 1932.

10. Copyright "suit turns upon . . . existence of copyright . . . and . . . infringement . . . through copying." *Arnstein v. ASCAP*. 29 F. 388 COB 23: 13. 1939.

11. "Assuming adequate proof is made of copying, that is not enough; for there may be 'permissible copying,' copying which is not illicit . . . The plaintiff's legally protected interest is . . . his interest in the potential financial returns from his compositions . . . The question, therefore, is whether defendant took from plaintiff's works so much . . . that defendant wrongfully appropriated something which belonged to the plaintiff." *Arnstein v. Porter*. 154 F2 464 COB 25: 11. 1947.

12. In the case of *INS v. Associated Press* the Supreme Court (248 U.S. 39 S. Ct. 68, 72) states, "The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant . . . is a very different matter . . ."

p. 53. ". . . when . . . news . . . has been published and distributed to the public, such news reports from that moment belong to the public . . . and all others who may desire to use them, for all purposes except for sale by a rival news agency to its news publishing members . . ." *Assoc. Press v. Kvos*. 9 F.S. 279 COB 20: 51, 53. 1934.

13. p. 59. "An absolute and unrestricted sale of a printed copy, especially where accompanied by filing similar copies with the Register, amounts to publication under the act; and I think the decisions support this view. *Werckmeister v. Am. Litho. Co.*, 134 F. 321, *Gottsberger v. Aldine Book Co.*, 33 F. 381; *Stern v. Remick*, 175 F. 282; *Callaghan v. Meyers*, 128 U.S. 617."

Finds that limited transfer did pass right to copyright—contrary to other decisions.

p. 60. ". . . plaintiff's exclusive property in the article terminated on its publication . . . in the newspapers . . . the wide and general publication of it without recognition of any copyright, which was assented

to by the plaintiff, amounted to abandonment . . ." *Atlantic Monthly v. Post Pub. Co.*, 27 F2 556, 557, 558. COB 20: 59, 60. 1928.

14. p. 7. "Literary property in a book cannot be protected by trademark nor otherwise than by copyright." p. 8 "The author of a literary work or composition has, by common law, the exclusive right to the first publication of it. He has no exclusive right to multiply or control the subsequent issue of copies by others; the right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others is the creature of statute . . . (Palmer v. DeWitt, 47 N.Y. 532; 7 Am. Rep. 480)"

p. 8. "We agree . . . that 'the fact that appellee's . . . stories are not the highest class of literature' . . . does not take from the stories their essential character as literature in the eyes of the law."

p. 9. "Neither the author nor proprietor of a literary work has any property in its name . . . If literary property could be protected under the theory that the name . . . is equivalent to a trade-mark, there would be no necessity for copyright laws . . ." *Atlas v. Street & Smith*. (CCA.8) 204 F. 398. COB 17: 3. 1913.

15. Cites cases over 170 years showing that common law copyright in letters resides in writer and his heirs.

p. 19. "It is generally recognized that one has a right to the fruits of his labor . . ."

p. 21 cites cases to show, "The right of the author to publish or suppress publication of his correspondence is absolute in the absence of special considerations . . . The author parts with the physical and material elements which are conveyed . . ."

p. 23. "In this opinion publication has been used in the sense of making public through printing or multiplication of copies." *Baker v. Libbie*. 97 NE 109; (Sup. Ct. Mass.) COB 17: 14. 1912.

16. p. 99. Interpretation of fair use of technical and scientific works should receive broader and more liberal interpretation when the purpose of the borrowing is (1) the acquisition of knowledge by a student, (2) the application of the appropriated material in the practice of an art or profession, (3) use in publications serving a different rather than a competing purpose.

p. 103. "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge it contains . . . and where the art it teaches cannot be used without employing

the methods and diagrams used to illustrate the book . . . such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explaining the art, but for the purpose of practical application."

p. 104. "The use of the art is a totally different thing from a publication of the book explaining it." *Baker v. Seldon*. 101 U.S. 99; 55 F. 84. 1879.

17. p. 387. ". . . if a formal copyright was ever obtained, it was invalid, because of previous publication and sale."

p. 358. "If no copyright at all, or—what comes to the same thing—no valid copyright has been obtained, the author has no exclusive right in the product of his artistic skill, and to copy is therefore not to compete unfairly in a legal sense, but to compete with full sanction of the law." *Bamforth v. Douglass Post Card*. 158 F. 357, 358. 1908.

18. p. 691. "Nor does the length of time elapsing between the composition and the copyrighting of Belasco's song destroy his exclusive rights in it. There is no limit to the time a common law copyright may run, unless an act of dedication destroys it, 17, U.S. C.A. § 2 and annotations thereunder." *Baron v. Feist*. 78 F.S. 686. 1948.

19. p. 970. "Lectures, oral or written cannot be published without the consent of the lecturer, though taken down when delivered."

p. 971. "Unless there be a most unequivocal dedication . . . by the author . . . the author had a property right therein, and that the copyright thereof exclusively belongs to him."

Held (p. 971) that even though students were permitted to make copies, that was not for the purpose of publication. *Bartlett v. Crittenden*. Case #1,076 (5 McLean 32) 1849, 2 F. Cas. 970.

20. p. 29. "I hold that the copyright was invalid in respect of No. 858 by reason of previous publication in the United States and abroad, without the required statutory notice of United States copyright . . ."

p. 31. "Therefore, the publication of a book or . . . one of the component parts thereof, in a foreign country, without notice of United States copyright thereon, will prevent the owner . . . from subse-

quently securing a valid copyright thereof in the United States." *Basevi v. O'Toole*. 26 F.S. 41 COB 22: 29, 31. 1939.

21. "The object of copyright is to promote science and the useful arts. If an author . . . could withdraw . . . ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development . . ." *Becker v. Loew's*. (C.C.A. 7) 133 F2 899. COB 24: 62. 1943.

22. Case interesting in that Judge Ward ruled that an earlier sketch, differing from the final painting, is covered by the copyright in the painting. This conflicts with decisions on published work, which require a new copyright for each edition. *Beifeld v. Dodge*. 198 F. 658. COB 17: 23. 1911.

23. p. 978. "The constitutional purpose of promotion of trade and the fine arts is not meant to be accomplished by unlimited dissemination of the copyrighted subject, but by giving the artist the advantages of monopoly with a free choice of methods of exploitation. Thereby it is sought to encourage other artists to produce other objects of art because of the financial gain promised by such a monopoly." The court held that reproduction of a print in a sales catalog was not dedication since it was solely for advertising purposes. *Bell v. Catalde*. 74 F.S. 973. 1947.

24. Held that quoting exact text for purpose of criticism is fair use. Also that damage to sale of a journal by extracting an article is probably so minute as to preclude consideration by the courts. *Bell v. Whitehead*. 3 Jurist 68. 1839.

25. ". . . I think that the filing of the title of a magazine is sufficient to secure a copyright of the articles in it, if they are written or owned by the proprietor of the magazine." *Bennett v. Boston Traveler Co*. 101 F. 445, (C.C.A. 1). 1900. *Harper v. Donohue*. 144 F. 491, 497. 1905. (Affirmed C.C.A. 146 F. 1023.)

26. p. 13. "The English House of Lords, in *Donaldson v. Becket*, 4 Burr. 2408 (1774), decided that the exclusive right of multiplying and vending copies of an intellectual work is of purely statutory origin. And the Supreme Court of the United States rendered a similar decision in *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055 (1834). The earliest statute on the subject was passed in England

in 1710. (St. 8 Anne, ch. 19.) Connecticut passed a copyright act in 1783, which was entitled 'An act for the encouragement of literature and genius.' It recited in its preamble that: 'It is perfectly agreeable to the principles of natural equity and justice that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country and service to mankind. (Acts and Laws of Conn. Jan. Sess. 1783.)' "

p. 17. "In *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922, 59 C.C.A. 148, 62 L.R.A. 607 (1903), this court declared that an author who pirated a large part of his work from others would not be entitled to ask to have his copyright protected. This conclusion was based upon the general proposition that equity would refuse its aid to a suitor who had himself been guilty of the same inequitable conduct which he denounced in others."

p. 24. "In our opinion, one who so embodies copyrighted with uncopyrighted matter that one reading his work cannot distinguish between the two has no right to complain if the book is republished by third parties. It is true that Bently did insert the statutory notice in the Code by which he directed attention to the fact that the Telegraph Cyphers were included in the new publication, but the statutory notice was intended by Congress to apply to publication as a whole—where the author is copyrighting the work as a whole. It was not intended by Congress that, by inserting notice in an uncopyrighted work that it contains copyrighted matter, the author could thereby prevent the republication by a stranger of the uncopyrighted book. In this case the English book covers more than 200 large pages and the original American work less than 40. One cannot ascertain what part of the English book contains the copyrighted matter taken from the American book, unless he is able to obtain from source a copy of the original work and compare it letter by letter and word by word with the book subsequently published in England. This we do not think he is called upon to do. If one intends to assert his exclusive right to publish and sell copyrighted matter, he must so clearly indicate the matter in which he has the exclusive right that the public upon inspection can determine the question of its own rights therein. He cannot require the public to search the markets to find a copy of his copyrighted book, then purchase it, and then com-

pare it word by word with the uncopyrighted work." *Bentley v. Tibbals*. (C.C.A. 2) 223 F. 247 COB 18: 11. 1915.

27. p. 516. Superior Court of Pennsylvania said that a printed but as yet unpublished book was covered by author's common law property rights. *Berry v. Hoffman*. 189 A. 516. 1937.

28. Previous publication without notice amounts to dedication to the public and defeats subsequent attempt to copyright. *Bessett v. Germain*. 18 F.S. 249. COB 21: 16. 1937.

29. "The common-law copyright is lost by the general publication or unrestricted sale of a single copy." *Bobbs-Merrill v. Straus*. 147 F. 19 (C.C.A. 2) 1906.

30. p. 346. "The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."

p. 347. "The rights do not co-exist in the same composition; when the statutory right begins the common law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common law rights are lost, and unless the publication be in accordance with the requirements of the statute, the statutory right is not secured." *Bobbs-Merrill v. Straus*. 210 U.S. 346, 347. 1907.

31. p. 980. "The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case, no such contract is proved. The most that could possibly be said, in regard to the right of Stuart, or his trustee, in the play, is, that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript."

p. 981. "The true doctrine is, that the literary property in the manuscript continues in the author, so long as he exercises control over it, or has the right to control it; and, until its publication, no one has a right to its use or that of its contents, without his consent. Therefore,

any special use of it by him, in public, for his own benefit, is a use perfectly consistent with his exclusive right to its control, and is no evidence of abandonment. *Roberts v. Myers* [Case No. 11,906].”

p. 981. “A man’s intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced.” *Boucicault v. Fox Case No. 1,691 3F Cas. 980-81. S.D. N.Y. 1862.*

32. “There is no question as to what is meant by ‘copyright proprietor.’ ‘Proprietor’ . . . must trace his title from the author.” *Borden v. General Motors. 28 F.S. 330 COB 23: 40. 1939.*

33. Incidental, fragmentary publication of chorus of song in magazine article about its subject is fair use because it did not impair the value of the copyright song or replace it. *Broadway Music v. F. R. Publishing. 31 F.S. 817 COB 23: 42. 1940.*

34. p. 62. “. . . deposit . . . of Exhibit 1A with the Library of Congress was a publication of the contents thereof . . . and effectively destroyed the literary property . . . at common law.”

p. 63. “. . . in making a deposit . . . Henry W. Savage published that version and effectively dissipated all common law literary property in that version.” *Brown v. Select Theatres. 56 F.S. 438 COB 25: 57. 1944.*

35. p. 911. “Articles intended for practical use in cooperation with a machine are not copyrightable. *White-Smith Music Pub. Co. v. Appollo Co., 209 U.S. 1, 28 S. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628.* Both law and policy forbid monopolizing a machine except within the comparatively narrow limits of the patent system. In several patents on recording machines, the necessary printed chart is rightly claimed as one of the operative elements. Since the machines which cooperate with the charts in suit are useless without them, to copyright the charts would in effect continue appellant’s monopoly of its machines beyond the time authorized by the patent law.” *Brown Instrument v. Warner (CCA DC) 161 F2 910. 1947.*

36. p. 645. “There is a distinction between the property of a creator in his idea and his property in the manuscript setting forth his idea

(property in a personal chattel), as well as his right to prevent others from reproducing his expression of his idea—the present-day common-law right to make original publication and statutory authority to multiply copies for a limited time to the exclusion of others. Common law and statutory copyright, 17 U.S.C.A. 1-73, are monopolistic in nature. Generally speaking, one's common-law monopolistic right to publish a literary work ceases upon publication and statutory copyright continues the monopolistic right to multiply copies thereafter for a limited period . . . The two do not exist concurrently. Copyright protects the expression of an idea. It does not protect the idea." *Brunner v. Stix*. 181 SW 2: 643. 1944.

37. p. 28. "Plaintiff can claim no exclusive right to the sale of 'second-hand sets.' Its exclusive right of sale of a particular copy is gone when it parts with the title to such a copy. *Henry Bill Publishing Co. v. Smythe* (C.C.) 27 Fed. 914." *Bur. National Literature v. Sells*. 211 F. 379 COB 17: 25. 1914.

38. A professor lecturing to his class is not making a communication to the public at large. Cites many types and cases of private disclosure. *Caird v. Sime*. L.R. 12: 326. *H. of Lords & Privy Council Appeal Cases*. 1887.

39. "At common law the exclusive right to copy existed in the author until he permitted a general publication. Thus when a book was published in print, the owner's common law right was lost." *Caliga v. Inter Ocean*. 215 U.S. 182, 188. 1909.

40. p. 650. "The general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has not exclusive right in the judicial opinions published, is supported by authority. *Curtis on Copyright*, 131, 132; *Butterworth v. Robinson*, 5 Ves. 709; *Cary v. Longman*, 1 East, 358, and note, 362; *Mawman v. Tegg*, 2 Russell, 385, 398, 399; *Hodges v. Welsh*, 2 Irish Eq. 266, 287; *Lewis v. Fullarton*, 2 Beavan, 6; *Saunders v. Smith*, 2 Mylne & Cr. 711; *Sweet v. Benning*, 16 C. B. 491; *Jarrold v. Houlston*, 3 Kay & Johns, 708, 719, 720."

p. 656. ". . . As the delivery of the copies of volume 32 to the Secretary of State, for the use of the State, took place on the 2d of October, 1865, and the work was not deposited in the clerk's office until the

17th of January, 1868, it is contended that such delivery of the copies to the State was a publication of the volume, and that the deposit of it did not take place until three months and fifteen days after publication . . . We think that the delivery of the copies for the use of the State was a publication of the volume; that the deposit of the work was not made in time; and that the copyright of volume 32 therefore fails." *Callaghan v. Meyers*. 128 U.S. 650, 656. 1888.

41. p. 39. Says that deposit in the Library of Congress is publication. *Cardinal Film v. Beck*. 248 F. 368 COB 19: 39. 1918

42. p. 547. "Copyright in analogy to patents, is to reward originality and inventive genius, and to encourage it to put out its productions for public enjoyment and benefit, which otherwise the author proprietor might withhold, having right and power to do so, for his exclusive use and pleasure. If, however, the production is intended for or bound to be given free and unrestricted public exhibition—to attract the public to come and enjoy without price—and, if it is so displayed, there is publication of the thing and dedication to the public, again in analogy to patents, defeating copyright. For this display inevitably exposes the production to copy, and so is inconsistent with claim of copyright, and the latter cannot be preserved by any notice thereof hung upon the exhibit. This accords with the spirit of the law, and is suggested by *American Tobacco Co. v. Werckmeister* (207 U.S. 300, 28 Sup. Ct. 72, 52 L. Ed. 208 Ann. Cas. 595).

"That is this case. Plaintiffs built the structure for public free exhibition and were bound to yield it to such. They could not withhold it. This elk could no more be copyrighted than Liberty Enlightening the World, or the Dewey Arch, or the Washington Monument, and no one will seriously claim these latter could be." *Carns v. Keefe*. 242 F. 745 COB 18: 546. 1917.

43. To infringe substantial copy of whole or of material part of copyright work must be produced. *Carr v. National Capitol Press*. 71 F2 220, 63 App. D.C. 210. COB 20: 147. 1934.

44. p. 43. "The transfer of the title to a writing does not necessarily involve a transfer of the publication rights. A transfer of such rights will be presumed from a transfer of title unless there is a specific reservation in the act of transfer. *Pushman v. New York*

Graphic Society, 287 N.Y. 302, 39 N.E. 2d 249.” *Chamberlain v. Feldman*. N.Y.S.Ct. 79 N.Y.S. 2, 42. Jan. 1948

45. p. 714 “But since the literary property in a manuscript is and always has been separate from the actual manuscript itself, that is, something in the nature of a chose in action, the right to publish may not be inferred from the mere possession of the manuscript . . .”

p. 715. “As above stated, literary rights have always been held to be separable from the manuscript itself. *Stephens v. Cady*, 14 How. 528, 55 U.S. 528, 530, 14 L. Ed. 528, and cases there cited . . .”

“We are, of course, concerned here with the so-called common law copyright, not statutory copyright. This common law copyright is sometimes called the right of first publication. There is no question but that it is a different and independent right from the usual right of ownership of an article of personal property. *Stephens v. Cady*, 14 How. 528, 530, 55 U.S. 528, 14 L.Ed. 528.’” *Chamberlain v. Feldman*. S.Ct. N.Y. 84 N.Y.S.2 713. Dec. 1948.

46. p. 73: “The first question . . . is that of the validity of the copyright. Our starting point must be the Constitution. For, as the constitutional power to enact the Copyright Act derives from Article I, Section, 8; that Act would be void if it went beyond granting monopolies (or exclusive franchises) to . . . ‘promote the progress of science and the useful arts.’” *Chamberlin v. Uris Sales*. 150 F2 512 CCA 2 COB 25: 72. 1945.

47. “. . . to constitute infringement ‘intention to infringe’ is not essential under the act.”

p. 133. Held in the case of *Am. Press Assoc. v. Daily*, 120 F. 766 and the Supreme Court dismissed the appeal (193 U.S. 675) that party who copied a story from a copy from which notice had inadvertently been omitted was liable for damages. (Before law of 1909.) *Chappell v. Costa*. 45 F.S. 554; COB 24: 132. 1942.

48. p. 38. “In *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8, 136, it was substantially held that a copyright might be claimed where the author of a book has taken material from sources common to all writers if he has arranged and combined the material in a new way, and that if he exercised skill and discretion in his independent work he earned the right to statutory protection. The same rule has frequently been laid down in subsequent decisions.” *Chautauqua School*

of Nursing v. National School of Nursing. 211 F. 1014 COB 17: 35. 1914.

49. p. 550-1. "Considering the text first: The complainant had no monopoly of the things taught in its lecture, because they were the common teaching. Maj. Reynolds, in preparing his lecture, had a right to consult all previous publications on the subject, including the complainant's lecture No. 6, and to state in his own language what he thought to be the proper and the best practice. From the nature of things there were certain to be considerable resemblances, just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself." *Chautauqua v. National.* (CCA 2) 238 F. 151 COB 18: 548. 1916.

50. p. 79. "To constitute infringement there must be a substantial copy of the whole or of a material part of the copyrighted work." *Christianson v. West.* 149 F2 202 (CCA 9) COB 25: 78. 1945.

51. p. 71. "Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties. The man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of it as he could of the pork which he purchased. The rights of the parties are to be determined primarily by the contract which they make, and the interpretation of the contract is for the court. If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work but to have it published in the manner in which he wrote it. The purchaser can not garble it or put it out under another name than the author's, nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.

"The position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name or to perform before the public necessarily affects his reputation and standing and thus impairs or increases his future earning capacity." (Concurring opinion of J. Seabury.) *Clemens v. Press Publ.* 122 N.Y.Sup. 206 COB 18: 69. 1910.

52. p. 75. "The judgment of the court is that the notice published in 'Men's Wear' was so defective in the respects indicated as not to convey to any one the existence of a copyright, and its conclusion upon the whole case is that the complainant has a valid copyright; that incidentally these defendants have infringed the same; that by reason of the improper and defective publication in 'Men's Wear,' from which the defendants copied the same, no damages will be awarded against them: that, the defendants having promptly discontinued the use of the copyrighted illustration, they will be enjoined only from its future use, if such injunction is desired, but without costs to the complainant." *Cohn v. Etchison.* 225 F. 135. COB 18: 73. 1915.

53. p. 183. A musical recording of a poem does not violate the copyright of the poem. "Whatever may superficially appear to be the justice of appellant's claim, it is to be remembered that his case is governed entirely by the statute. And while in the 1909 revision of the Copyright Act composers were given the exclusive right of recording their copyrighted musical compositions and the like right was granted to authors of copyrighted dramatic works, Congress did not see fit to give like protection to copyrighted poems, stories or works of that nature."

p. 178. "... the word 'vending' did not of itself enlarge the scope of copyright . . ." *Corcoran v. Montgomery Ward.* 121 F2 572 (CCA 9) COB 24: 180. 1941.

54. "I think, under the present act even more strongly than heretofore, complainant must show his title not merely by allegation that he is the proprietor, but by setting forth facts, which show how he became proprietor . . ." *Crown Feature Film v. Levy.* 202 F. 805 COB 17: 44. 1912.

55. p. 86. "The very purpose of publishing a book on science or the useful arts is to communicate to the world the useful knowledge

it contains. But the object would be frustrated if the knowledge could not be used without incurring the guilt of piracy . . . And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book . . . such . . . are to be considered as necessary incidents to the art, and given . . . to the public . . .”

p. 87. “To state it another way, plaintiff recognizes defendant’s right to use the plan or method . . . but denies . . . the right to use the words necessary to effect such use. It appears to us that the concession is inconsistent with the denial.”

p. 88. “To hold that an idea . . . described in a copyright is open to the public, but that it can be used only by employment of different words and phrases which mean the same thing, borders on the preposterous.” *Crume v. Pacific Mutual*. 140 F2 182 (CCA 7) COB 25: 84. 1944.

56. The trial court has found that the publication of the work in Germany was the result of a contract between the publishers and the author, and the defense rests upon the proposition that, inasmuch as the drama has been published and sold with the authority and by the consent of the person who wrote it, all exclusive literary property therein has ceased, so far as this country is concerned, and any one here now has a legal right to produce it, either in its literary form or on the stage, in German or English. The rule relied upon by the respondents is thus stated by Mr. Drone in his well-known treatise on the Law of Copyright:

“‘When a dramatic composition is published in print by authority, all common-law rights in it are lost. The composition becomes common property unless a valid copyright is secured under the statute. And this is equally true whether the publication be made in one country or in another; whether in the United States or in Europe.’ Drone, Copyr. 577.

“‘It is a proposition now so well settled as to be almost axiomatic,’ said the Circuit Court of the United States in the Maryland District in the *Iolanthe* Case, 15 Fed. 439, ‘that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end.’

"Under this doctrine the publication by the author of the text of a drama in a printed book destroys his playwright, or right to control the representation of the drama on the stage. Drone, Copyr. 583; The Mikado Case, 25 Fed. 183. After Sudermann, therefore, had transferred to Lederer, and Lederer had transferred to the plaintiff, the exclusive right to produce and perform 'Die Ehre' in English in the United States, the plaintiff had acquired the author's common-law right of representing the play in this country; but that right became the property of any one who chose to exercise it when the original play was subsequently published and sold in book form with Sudermann's authority, if it was in fact so published and sold. To justify their production of the play, then, it was essential for the defendants to show that Sudermann consented to the publication by the houses of Lehmann and Cotta, for it has been held that the consent of the author in such a case must be affirmatively proved by the party who relies upon it. Boucicault v. Wood, 2 Biss. 34, Fed. Cas. No. 1, 693. I think that the defendants sustained their burden in this respect." *Daly v. Walrath*. 57 N.Y. Suppl. 1126 N.Y. Sup. Ct. 1899.

57. p. 48. ". . . unconditional sale of the story entitled the purchaser to protection from piracy upon securing a statutory copyright . . . (Receipt in this case read, (c.f.p. 52), "Received of Ess Ess Publishing Company \$85 in full payment for story entitled . . . H. J. W. Dam."

p. 55. Drone cited as authorizing non-author or non-proprietor to obtain copyright in trust for the author.

p. 56. "In view of this decision by the Supreme Court, we think that had Dam retained the dramatic rights to his story the entry of the magazine and the notice of copyright would have been insufficient to protect them. A notice of the copyright of the Smart Set magazine . . . is hardly equivalent to a notice that the story "The Transmogrification of Dan" is copyrighted by or in favor of H. J. W. Dam."

p. 904. ". . . a sale or assignment without reservation would seem necessary to carry all the rights incidental to ownership. And a transaction in which an author delivers his manuscript and accepts a sum of money 'in full payment for story' cannot be regarded as a sale with reservations."

Note: Judge Ward dissented saying that sale of story to magazine and receipting for full payment does not imply transfer of copyright (same p. 910).

p. 905. Publisher may take copyright and hold it in trust for rightful owner unless owner has indicated in some way that he did not authorize publisher to become proprietor. *Dam v. Kirke LaShelle*. 166 F. 589 COB 17: 46. 1908. *Appeal (CCA 2)* 175 F. 902 COB 17: 51, 1910.

58. p. 977. "... Essence of copyright is publication with notice of copyright."

p. 977. Section 41 U.S.C. 17 states "... sale or conveyance ... shall not of itself constitute a transfer of the copyright ..."

p. 977. "Assignment cannot be implied." *Davenport Quigley ... v. Century Productions*. 18 F.S. 974. 1937. COB 21: 65.

59. p. 75. "The rights of the Sun must depend upon the language of the statute" "It follows that there are two prerequisites to relief. One is that a copyright shall exist, and the other is that a copying shall have taken place."

"The statute is infringed only by 'copying' that which is 'copyrighted.' The essence of copying is literary piracy ..."

News may not be copyrighted. *Davies v. Bowes*. 209 F. 53 COB 17: 72. 1913.

60. p. 86. "Every reproduction of a copyrighted work must bear the statutory notice. (American Tobacco Co. v. Werckmeister, 207 U.S. 284, 294.)" *DeJonge v. Breuker*. 235 U.S. 33 COB 18: 86. 1914.

61. "While it is not necessary that all or even a large part of the work be copied, a substantial part of it must have been copied" *DeMontijo v. Twentieth Century Fox*. 40 F.S. 133. COB 24: 200. 1941.

62. Republication of parts without proper notice vitiates copyright in the parts so published. *Deward v. Bristol*. 34 F.S. 345. COB 23: 130, 134-37. 1939.

63. Publication of parts serially without statutory notice makes them public property even tho copyright on entire work had previously been taken out.

Publication serially without notice makes it impossible to copyright later. *Deward v. Bristol*. (CCA 4) 120 F2 537 COB 24: 217-218. 1941.

64. p. 81. "In this country the right of an author to multiply copies of books, maps, etc., after publication is the creation of Federal statutes. These statutes did not provide for the continuation of a common-law right, but under constitutional authority created a new right." (*Globe v. Walker*. 210 U.S. 356.) *Dixon v. Runkel*. 214 F. 418 COB 17: 76. 1914.

65. p. 842. ". . . it is safe to say that appearance of a pamphlet . . . in a public hotel, subject to be seen and read by any person . . . certainly was a 'rendering it accessible to public scrutiny' . . ." *D'Ole v. Kansas City Star*. 94 F. 840. 1899.

66. Act in addition to mere infringement is required to constitute unfair competition. Photo-offset infringes. *Donnelley v. Haber*. 43 F.S. 456. 1942.

67. Court used percentage of defendant's book allegedly copied as basis for "substantial." *Dun v. Lumbermen's Credit*. 144 F. 83. 1906.

68. p. 85. "It follows, therefore, that what she gave to the public in an official bulletin could not afterwards be taken from the public under the guise of copyright." *DuPuy v. Post Telegram*. (CCA 3) 210 F. 883 COB 17: 82. 1914.

69. p. 200. "Just as a patent affords protection only to the means of reducing an inventive idea to practice, so the copyright law protects the means of expressing an idea . . . if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist."

p. 201. "It has been pointed out that the protection of the statute extends to 'all copyrightable component parts of the work copyrighted,' which phrase presupposes that there may be much in what is popularly called a copyrighted work as to which the statute affords no protection."

p. 202. ". . . by repeated decisions infringement of copyright is judicially held to consist in the copying of some substantial and material

part of that as to which the statute affords protection." *Dymow v. Bolton*, 11 F2 691 (CCA 2) COB 20: 201. 1926.

70. "... the act . . . declares that protection is extended to 'all copyrightable component parts of the work copyrighted.' The inference is that there may be in that for which claim is made much to which the protection of the act cannot extend . . ."

Copyright of a pamphlet containing an official report does not copyright the official report which it contains. *Eggers v. Sun Sales*. 263 F. 373 (CCA 2). COB 19: 74. 1920.

71. "As . . . licensees are not assigns, they were not proprietors and, therefore, could not copyright the individual 'Caisson Song' when they copyrighted their compilation."

Where composer of song allowed others to use it in compilation which was copyrighted he could not assign copyright later because song was in public domain. *Egner v. Schirmer*. 48 F.S. 187, COB 24: 236, 1942. *Affirmed*.

72. p. 559. "The object of copyright is to promote science and the useful arts. If an author by originating a new arrangement and form of expression of certain ideas or conceptions could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation; and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright instead of being promoted. A poem consists of words, expressing conceptions of words or lines of thoughts, but copyright in the poem gives no monopoly in the separate words or in the ideas, conception, or facts expressed or described by the words. A copyright extends only to the arrangement of words. A copyright does not give a monopoly in any incident in a play. Other authors have a right to exploit the facts, experiences, field of thought, and general ideas, provided they do not substantially copy a concrete form in which the circumstances and ideas have been developed, arranged, and put into shape. (*Holmes v. Hurst*, 174 U.S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904.)"

p. 561-2. "There is an important distinction between copyrights and patents. Letters patent give a monopoly to make, vend, and use, while copyright does not give an exclusive right to use. Copyright protection is extended to authors mainly with a view to inducing

them to give their ideas to the public so that they may be added to the intellectual store, accessible to the people, and that they may be used for the intellectual advancement of mankind." *Eichel v. Marcin*. 241 F. 404 COB 18: 551. 1917.

73. p. 142. Although there were no damages and no profits, statutory damages were allowed the Saturday Evening Post for each reprinting of an article from it. *Eliot v. Geare*. 30 F.S. 301 COB 23: 142. 1939.

74. "A proprietor must trace his title from the author."
"While the Copyright Act should be liberally construed with a view to protecting the just rights of authors and encourage the development of literature and art . . . the complainant should show that the person in whose name the copyright was obtained was the rightful owner . . ." *F & D Music v. Twentieth Century*. 19 F.S. 769. COB 21: 121. 1937.

75. The copyright owner, "is entitled to any lawful use of his property, whereby he may get a profit out of it." *Falk v. Donaldson*. (CC) 57 F. 37. 1893.

76. "BROWN, J. We have felt considerable difficulty in reaching a satisfactory conclusion in this case, from the fact that the piracies, though numerous, are not extensive; and from the further fact that defendant's pamphlet was evidently not intended to supersede, or in any way interfere with the sale of, the elaborate and instructive work of the plaintiff. Where defendant's publication is designed to rival or compete with the plaintiff's in the market, courts are astute to protect the technical rights of the plaintiff to his composition, and will even enjoin an imitation of his general plan and arrangement, though there be no plagiarism of sentences or ideas. Where defendant has been guilty of a complete or substantial reprint of plaintiff's work, no difficulty is encountered in granting an injunction; but where the alleged violation consists in excerpts from the plaintiff, the court is bound to consider not only the quantity and quality of the matter appropriated, but the intention with which such appropriation is made, the extent to which the plaintiff is injured by it, and the damage to the defendant by an injunction."

"... It is not only quantity, but values and quality, that are to be regarded in determining the question of piracy. *Bramwell v. Hal-*

comb, 3 Mylne & C. 738. 'It must appear,' said Vice-Chancellor SHADWELL, 'where a complaint is made to this court, that the piracy has either been of what is called a large part or of a material part . . .'

" . . . Regarding the intent with which the appropriation is made, it is obvious that the use of a certain amount of an author's production may be perfectly fair and legitimate in one case, while the use of a similar amount in another case might be unlawful. Thus, great liberty is exercised in permitting a reviewer to make extracts for the purpose of criticism, so long as such extracts are not made as a cover for a republication, or for the purpose of superseding the original work. Indeed, such quotations in the form of criticisms are frequently of great value to the author himself, and may actually increase the sale of his book. Other instances may be imagined, especially in the publication of legal and scientific works, where it would be almost impossible for a subsequent author to properly state the existing state of the science, without making quotations from preceding works. On the other hand, if the selections are made *animo furandi*, with intent to make use of them for the same purpose for which the original author used them, to convey in a different publication the information which he imparted, or to supplant him in his own territory, a small quantity will suffice to render the defendant liable to a charge of piracy." *Farmer v. Elstner*. 33 F. 494, 495, 496. 1888.

77. p. 92 notes that English law provides, ". . . the first public presentation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book."

p. 94. "The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use. (Macklin v. Richardson, Ambler, 694; Morris v. Kelley, 1 Jac. & W. 481; Boucicault v. Fox, 5 Batchf. 87, 97; Crowe v. Aiken, 2 Biss. 208; Palmer v. DeWitt, 2 Sweeny, 530, 47 N.Y. 532; Tompkins v. Halleck, 133 Mass. 32.)" *Ferris v. Frohman*. 223 U.S. 424 COB 17: 92, 94. 1912.

78. p. 105-6. "LEARNED HAND, District Judge (after stating the facts as above). [1] The second point raised by the defendant

seems to me determinative of the case. I think that play right and copyright are quite distinct under the statute, in spite of the fact that printed publication will forfeit both, and that one statutory copyright will protect both. If so, Clyde Fitch was justified in reserving his common-law play right from the original assignment to the Macmillan Company, and they could, by the necessary formalities on the printed play, create a statutory play right, which they held in trust for him, and a statutory copyright, which they held beneficially. This is the effect of Judge Holt's decision as to the right to dramatize, a similar right, in *Ford v. Charles E. Blaney Co.* (C.C., 148 Fed. 842). Judge Noyes in *Dam v. Kirk LaShelle* (175 Fed. 902, 99 C.C.A. 392, 41 L.R.A., N.S., 1002, 20 Ann. Cas. 1173), in citing *Ford v. Charles E. Blaney Co.*, supra, speaks of this as 'probably' the law, and Judge Hazel had so held in the court below. (166 Fed. 589.)"

p. 107. "If, on the other hand, the play right and copyright be deemed to be indivisible, in such sense that one may not be assigned without the other, while it is true that the Macmillan Company would become only a licensee under the assignment to Clyde Fitch, yet there would be a fatal defect in the copyright itself. For in that case the Macmillan Company could hardly be regarded as the 'proprietor' of the indivisible common-law literary property out of which alone the statute play right and copyright could be created." *Fitch v. Young*. 230 F. 743 COB 18: 104. 1916.

79. p. 344. "... the question of piracy often depends upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials . . ."

p. 346. "But, consistently with this right, the persons to whom they are addressed, may have, nay, must, by implication possess, the right to publish any letter or letters addressed to them, upon such occasions as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions . . ."

"... a person may justifiably use and publish in a suit at law or in equity, such letter or letters as are necessary and proper to establish

his right to maintain the suit or defend the same. So if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach."

p. 347. "In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."

p. 348. "Many mixed ingredients enter into discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused . . . into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as piracy; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy." *Folsom v. Marsh*, *Fed. Cas.* #4,901, 9 *Fed. Cas.* 344, 346, 348. 1841.

80. "... the filing of the title of a magazine is sufficient to secure a copyright of the articles in it if they are written or owned by the proprietor of the magazine . . . I cannot see how there can be any question of the validity of such a proceeding if the proprietor of the magazine is the author or the proprietor of all the articles published in it; and if he is the author or proprietor of some of the articles, and not of the others, I do not see why a copyright so registered is not valid as to the articles which he either wrote or owns."

p. 645. "... a mere contract authorizing the publication of a story in a magazine does not [imply a sale of the copyright.]" *Ford v. Blaney*. 148 *F.* 644. 1906.

81. "... The owner of a copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property . . . The sole interest of the United States and the primary object in conferring the monopoly lie in, the general benefit derived by the public from labors of authors." *Fox Film v. Doyal*. 286 *U.S.* 127. 1931.

82. "The piracy of a picture . . . by the process of photography, or by any other process mechanical or otherwise whereby copies may be

indefinitely multiplied, is within the statutes for protection of artists and engravers." *Gambart v. Ball*. 14 CB (N) 306. 1863.

83. p. 191. "To publish is to divulge, to utter, to proclaim, to make known to the public that which was before private or unknown. To say that placing or erecting a design or work upon the highway, with an unrestricted view, and without notice of privacy . . . would be a singular and unwarranted denial of the legal meaning of such a term . . . A dedication by the author to public use is not required to make the design public; any way by which the novelty or design is communicated or made known is a publication . . ." *Gendell v. Orr*. 13 Phila. Rep. 191. 1879.

84. p. 104. "So far as the same is a question of law the defendant has been guilty of an infringement of the copyright of the plaintiffs in that it has printed, published, and resold parts of the copyrighted books and publications of the plaintiffs by incorporating such reproduced and reprinted portions with the original publications and printed books of the plaintiffs and reselling them as old or second-hand books published by the plaintiffs."

p. 106. "In order 'to promote the progress of science and the useful arts,' and to encourage authors and publishers to develop their talents and to undergo the labor and expense of producing original works which will be of value because of the benefit and advantage thereby accruing to the people, the law has granted an exclusive proprietary right to authors and publishers of all such publications. In the assertion of this right they should, at all times, receive full and adequate assistance from the law. Out of these rights, however, and indeed in order to give them full expression, grow the rights of the purchasers of such publications. One of these rights is the right to resell a book when once purchased. This right should likewise be full and untrammelled. Another right incidental to it is the right to care for and keep in good condition the books thus purchased. This necessarily gives the right to renovate, clean, and rebind. What they can do for themselves they can rightfully secure the services of others to do for them. This in turn involves a right of another kind, which is to purchase secondhand books and to do with them what the original purchaser had the right to do, one of which things is the right to vend them without or after renovation. While it is doubtless true that the part of the purchasing public which is thus supplied with

second hand books is withdrawn from the market for the purchase of new publications, a publisher of books and a second hand dealer in books (where there is no attempt to pass off the one for the other) cannot be said in any proper sense of the term to be in competition." p. 110. "The purchaser of a particular copy, as we have seen, acquires the right to resell it or to preserve and renovate it. Out of these acquired rights from the author, and out also of the doctrine of de minimis which doubtless also applies, grows the necessity of drawing the line between the lawful and the forbidden use of copyrighted publications."

p. 110. ". . . in *Harrison v. Maynard*, 61 Fed. 689, 10 C.C.A. 17. It is to this effect: After ruling that 'the right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser,' and that 'the exclusive right to vend the particular copy no longer remains in the owner of the copyright,' the opinion is expressed that 'the new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book.'" *Ginn v. Appollo*. 215 F. 772 COB 17: 101. 1914.

85. p. 55. "The record disclosed that Charles Hoffman, known as 'Think-a-Drink Hoffman,' acted and performed his sleight of hand tricks or stunts before many audiences since 1935. He is not protected by the terms and provisions of the Federal copyright statutes. On this record the conclusion is irresistible that these several acts and performances are not only a publication but a dedication to the public of the trick." *Glazer v. Hoffman*. Fla. S. Ct. 16 So2 53. 1943.

86. p. 162. "Respondents' right is the common-law right of an author in his unpublished manuscript. It is the sole right to decide by whom, when, where, and in what form, his manuscript shall be published for the first time; to restrain others from publishing it without his permission and from using it without his authority; and to recover damages from those publishing it without his permission or using it without his authority."

p. 162-3. ". . . a case of alleged piracy of unpublished, uncopyrighted material—is the same as that applied in cases of alleged piracy of copyrighted material. The test for determining whether there is

piracy is the same in both cases. The only distinction between the two classes of cases is that the law permits 'fair use' of copyrighted material. It does not permit 'fair use' of unpublished, uncopyrighted material." *Golding v. RKO*. 193 P2 153. 1948.

87. "... when a party comes into a court . . . seeking protection to a copyright, he must show that he is the author of the work, or that his title is derived from one sustaining that relation to the publication."

"Great difficulties often times surround the inquiry whether an alleged act of copying from an original author amounts to piracy, or whether it may or may not be justified on the ground of fair quotation, or that the use made of the book or its contents does not exceed what the law permits to another engaged in composing a new work upon the same subject. None of those difficulties, however, arise in the present case, as all the authorities agree that it is not necessary that the whole, or even the larger portion of a work, should be taken in order to constitute an invasion of a copyright; and they affirm the doctrine, that if so much is taken that the value of the original is sensibly and materially diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that such taking or appropriation is sufficient in point of law to maintain the suit. *Folsom v. Marsh* [Case No. 4,901]; *Wilkins v. Aiken*, 17 Ves. 424; *Mawman v. Tegg*, 2 Russ. 385; *Roworth v. Wilkes*, 1 Camp. 94; *Saunders v. Smith*, 3 Mylne & C. 711; *Lewis v. Chapman*, 3 Beav. 133; *Webb v. Powers* [Case No. 17,323]." *Greene v. Bishop Case No. 5763 (10 F. Cas. 1134) (CCA Mass.) 1858.*

88. Publication prior to copyright voided copyright of most of the stories. Illustrations by another were not the literary property of the author and were not therefore covered by the author's copyright. *Harris v. Coca Cola*. 73 F2, 370 (CCA 5) COB 20: 299. 1934.

89. p. 451. "In this action the ultimate offense which must be established by the plaintiff is the unauthorized copying of the whole or a substantial part of the plaintiff's playlet." *Heywood v. Jerico*. N.Y.Sup.Ct. 79 U.S.P.Q. 450. 1948.

90. p. 434. "But in this case notice of the copyright obtained has not been given as required. The law in that respect has not been followed. The fact of registration alone is placed upon the label.

The word 'copyright' is not used, and, of course, with its omission the essential facts respecting any copyright are omitted also. The law, therefore, has not been complied with, and by its very terms no action can be maintained for the infringement of the alleged copyright." *Higgins v. Keuffel*. 140 U.S. 428, 434, Oct. Term 1890.

91. "One test which, when applicable, would seem to be ordinarily decisive is whether or not so much has been reproduced as will materially reduce the demand for the original . . ." *Hill v. Whalen*. 220 F. 360 COB 18: 225. 1914.

92. "Conceding literary or artistic merit in the complainant's monologues growing out of some original matter, combined with old matter in a new and an original plan, arrangement, or combination, the defendants do not infringe, not having used that plan, arrangement, or combination unless they have abstracted and used some of the complainant's new matter and so much of it as to authorize the finding that there has been a copying or a taking.

"Copying the whole or a substantial part of a copyrighted work constitutes and is an essential element of infringement. It is not confined to literal repetition or reproduction, but includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced with more or less colorable alteration to disguise the piracy. But on the principle of *de minimus non curat lex*, it is necessary that a substantial part of the copyrighted work be taken. 9 Cyc. 939, 940." *Hoffman v. LeTraunik*. 209 F. 375 COB 17: 127-8. 1913.

93. p. 579. "The defendant's failure to comply with its contract left the plaintiffs with the power and the right to sell the motion picture rights which the defendant had refused to accept." *Hollywood Plays v. Columbia*. S. Ct. N.Y. 77 N.Y. 82 568. 1947.

94. p. 85. "An act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldsons v. Becket*, was followed by this court in *Wheaton v. Peters*, 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words,

that while a right did exist by common law, it has been superseded by statute."

p. 89. "If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public—and this, too, irrespective of his actual intention not to make such abandonment." *Holmes v. Hurst*. 174 U.S. 85, 89; 43 L. Ed. 904, 19. S.C. 606 (1899).

95. p. 141. "It is true that the law permits those working in a field of science or art to make use of ideas . . . and in certain cases even the exact words contained in a copyrighted book in that field . . . In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art." (Does not apply to commercial uses such as advertising a product.) *Holt v. Liggett*. 23 F.S. 302. COB 22: 138. 1938.

96. Copyright covers copyrightable parts only. *Howell v. Miller*. 91F. 129. 1898.

97. p. 170. "The right of a purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted . . ."

p. 171. "Abandonment is a question of intent . . ."

p. 174. "... no one has the right to take the results of the labor and expense incurred by another for the purpose of a rival publication . . . " (Morris v. Ashbee, L. R. 7 Eq. 34.)

p. 178. "An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private the rights of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified . . ." (Mr. Justice Holmes.) *International News Service v. Associated Press*. 248 U.S. 215 COB 19: 150. 1918.

98. p. 873. "... publication . . . operates to destroy the common-law rights, whether a copyright be secured or not."

p. 874. "If a book be offered gratuitously to the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher by that act, puts it in such a place that all the public may see it if they chose.

The reason why exposing for sale or offering gratuitously to the general public constitutes publication is stated in the last part of the rule as follows: 'So that any person may have an opportunity of enjoying that for which copyright is intended to be secured.'"

p. 876. ". . . the present state of the law is that if a book be put within reach of the general public so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common law copyright, or right of first publication, is gone."

p. 876. Depositing two copies of a reference book in the office of the librarian of Congress published it. *Jewelers' Mercantile v. Jewelers' Weekly*. 49 N.E.Rep. 873 C.A.N.Y. 1898.

99. p. 489. "Johnson, appellant's story editor, testified without equivocation that all he purchased was the right to use the title; that he told King, on several occasions, that all appellant wanted was use of the title; that it did not want any of the material in the book. Notwithstanding, appellant's resident counsel, Wassman, inserted in the written contract a provision giving appellant unqualified right to use the material in the book, the so-called 'covenant of nonsuit.' King objected. Appellant, through its resident counsel, then refused to go further with the transaction and refused to pay the purchase price. The oral agreement was breached by appellant." *Johnston v. Twentieth Century*. (DCA 3 Cal) 187 P2 474. 1947.

100. "Even under the expanded doctrine of 'unfair use' relied on by the plaintiff, the defendant does not infringe. Considering the comparative objects of the respective publications, it appears that they have nothing whatever in common. The defendant is in no sense competing with the plaintiff and the material appropriated by it cannot injure the plaintiff either by prejudicing the sale, diminishing the profits or superseding the objects of the original work. See Ball. Law of Copyright and Literary Property, pages 603-608. In fact, it would almost seem as though the plaintiff's books were intended to be used in some manner similar to that in which the defendant has used them. They are not literary productions to be read as a whole, but serve to place interesting facts in the hands of people who want to know about them or have some use to which they can put them. Of course, the plaintiff does not 'own' the facts themselves, but, on no other theory, could he restrain the use which the defendant

is making of them." *Kane v. Penna Broadcasting*. 73 F.S. 307. 1947.

101. p. 186. "When a periodical contains articles or pictures made by persons who have not transferred their rights to the publisher, the publisher's copyright of the periodical does not cover them. *Mail & Express v. Life*, 192 F. 899 (CCA 2)." *Kaplan v. Fox Film*. 19 F.S. 780 COB 21: 186. 1937.

102. 1. Intent—Use of a quotation from copyright work for a profitable commercial purpose, as distinguished from professional motives, is not a fair use.
2. No competition: fair use.
3. Quote was only small part of the article.
4. Resulted in no perceptible injury to copyright owner = fair use.

p. 311. ". . . copyright contemplates and permits fair use by all persons of the copyrighted work . . ." 18 C.J.S. Copyright and Literary Property Sec. 92, p. 213.

p. 312. ". . . Where the later work differs greatly in nature, scope and purpose from the original, a larger liberty in making quotations and extracts will be permitted than in cases where the respective works are more or less competitive." *Karll v. Curtis*. 39 F.S. 836 COB 24: 309. 1941.

103. "To what is the artist or author entitled as his conception and what if such original conception has been appropriated? He is entitled to any lawful use of his property whereby he may get a profit out of it. *Falk v. Donaldson*, 57 Fed. 32. It is the commercial value of his property that he is protected for, to encourage the arts by securing to him the monopoly in the sale of the object of the attraction. *Gambart v. Ball*, CB (NS) 306." *King Features v. Fleischer*. (CCA 2) 299 F. 533, COB 20: 360. 1924.

104. "When Korzybski filed his application and received his patent, he made a full disclosure of his invention and dedicated it to the public, save for his right to make, use, and vend it . . . The filing of the application for the patent . . . was a publication that entitled anyone to copy the drawings." *Korzybski v. Underwood*. (CCA 2) 36 F2, 727. COB 20: 373-4, 1929.

105. "Publication without proper notice is ineffective to secure a publisher a copyright." *Krafft v. Cohen*. 117 F2 401 COB 24: 316. 1941.

106. p. 377. "Protection against public performance or delivery of a copyright work is afforded only in the case of a lecture, sermon, address or similar production, a drama, or a musical composition . . . Other copyrighted works may be recited in public for profit without infringement." *Kreymborg v. Durante*. 21 USPQ 557; 22 USPQ 248, COB 20: 376, 377. 1934.

107. ". . . unrestricted exhibition of the house was a publication." Permitting the public to inspect a house with architect's consent was a general publication of his plans and his architectural plans became public property. *Kurfiss v. Cowherd*. 121 SW2 288, 1938.

108. Delivery of copies to Secretary of State constitutes publication even if Secretary of State has not distributed any copies. *Ladd v. Oxnard*. 75 F. 703. 1896.

109. A point of law argued by respondent was, "All the copies of Dana's edition, owned by Little, Brown & Co., would be lost. The suppression of Mr. Dana's notes would be a public loss, and the court cannot pick out and suppress a few references and leave the rest standing. No injunction has ever been granted in copyright cases, except upon the ground of protecting a pecuniary and existing interest in an existing book. There must be damnum as well as injuria, and one of the strongest grounds for issuing the writ is to prevent damages from competition, the extent of which a jury cannot accurately estimate. *Tinsley v. Lacy*, 1 Hem. & M. 747; *Hogg v. Kirby*, 8 Ves. 224; *Geary v. Norton*, 1 De Gex & S. 9; Phil. Copyr. 146; Curt. Copyr. 314." Complainant's attorney said, "The act of Congress does not require the complainant to keep copies on sale." The Court did not deal with this issue.

p. 61. "Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a

well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appears that the delay has misled the respondent. *Sweet v. Cater*, 11 Sim., 580; *Tinsley v. Lacy*, 1 Hem. & M. 752; *Spiers v. Brown*, 6 W.R. 353; *Strahan v. Graham*, 15 W.R. 487; *Bramwell v. Halcomb*, 3 Myl. & Cr. 738; *Reade v. Lacy*, 1 Johns & H., 527; *Jarrold v. Houlston*, 3 Kay & J. 717; *Lewis v. Fullarton*, 2 Beav. 6; *Bell v. Whitehead*, 17 L.T. 141; *Curtiss on Copyright*, 326; *Saunders v. Smith*, 3 Myl. & Cr. 711." *Lawrence v. Dana*, *Fed. Cas. #8,136*, 15 F. Cas. 61 (Mass., 1869). (Cited also in *Sampson v. Murdock*, 140 F. 542.)

110. p. 718. "A copyright is an intangible, incorporeal right in the nature of a privilege or franchise and is independent of any material substance such as the manuscript or plate used for printing. It is entirely disconnected therefrom."

"The principle is clearly stated by the court in *Werckmeister v. American Lithographic Co.*, C.C., 142 F. 827, 830, thus: "The author of a painting, when it is finished, before publication, owns a material piece of personal property, consisting of the canvas and the paint upon it. He also owns an incorporeal right connected with it; that is, the right to make a copy of it. These two kinds of property, although growing out of the same intellectual production, are in their nature essentially and inherently distinct . . ." *Local Trademarks v. Price* (CCA 5) 170 F2 715. 1948.

111. Subsequent publication of copyright matter in a journal which was copyrighted without notice of copyright in article itself voided the copyright of the book. *McDaniel v. Freedman*. (CCA 7) 98 F2 745 COB 22: 177. 1938.

112. p. 659. "... the question remaining is whether or not there was copying of substantial copyrightable material, which, of course, is essential in order that there be infringement." *McDonald v. DuMaurier*. 75 F.S. 655. 1948.

113. "... I am unable to believe that the defendant's use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of

his lectures without infringing." *Macmillan v. King*. 223 F. 862 COB 18: 275. 1914.

114. "The first contention . . . seems to be that the new copyright statute affords protection to proprietors of periodicals only in respect to such component parts thereof as were copyrightable by such proprietors.

"Stated more particularly, the claim seems to be that when a periodical contains articles or pictures made by persons who have not transferred their rights to the publisher the copyright of the periodical does not cover them.

"We have no reason to question the correctness of the defendant's contention." *Mail and Express v. Life Pub. Co.* (CCA 2) 192 F. 899-900 COB 17: 161. 1912.

115. p. 174. "The word 'publication' has no definite and fixed meaning . . . the thought, however, running through all the uses of the word, is an advising of the public . . . Associated Press v. INS (CCA 2) 245 F. 244)."

p. 176. "The law is well established that where the labors of an author are substantially and injuriously appropriated by another, an infringement occurs." *Marx v. U.S.* (CCA Cal) 96 F2 204 COB 22: 174, 176. 1938.

116. "There can be but one subsisting copyright of a single version of one work." (Citations.) *Marks v. Vogel*. 42 F.S. 859 COB 24: 425 1941.

117. p. 430. ". . . To sustain an action for infringement a substantial copy of the whole, or a material part, must be reproduced."

p. 431. "On the principle of *de minimus non curat lex*, it is necessary that a substantial part of the copyright work be taken."

p. 431. Fair use is to be determined by "nature and objects of selections made, quantity and value of material used, and the degree in which the use may prejudice the sale, diminish the profits or supersede the objects of the original work." *Mathews v. Palmer Bee*. (CCA 6) 135 F2 73 COB 24: 430, 431. 1943.

118. p. 306 Unfair competition is established through palming off.
p. 307-8. "The appropriation of a substantial portion of another's copyrighted work constitutes infringement. (*Springer Lith. Co. v. Falk*, 59 Fed. 707, 712 8 C.C.A. 224, C.C.A.2). It is also true the

defendant has not appropriated the entire copyrighted work, but he has materially diminished the value of complainant's work and appropriated its labors to an injurious extent. This constitutes infringement. (*Greene v. Bishop*, Fed. Cas. No. 5763. See also *Folsom v. Marsh*, Fed. Cas. No. 4901.)" *Meccano v. Wagner*. 234 F. 912 COB 18: 295. 1916.

119. Publishing and selling a copyright map in photostat edition for profit is a violation of copyright. *Midcontinental Map v. Kintzel*. 50 U.S.P.Q. 495 COB 24: 436. 1941.

120. p. 266. "'As the first twenty-nine chapters of 'The Minister's Wooing' appeared in the Atlantic Monthly before any steps whatever were taken, either by the publishers or by Mrs. Stowe, to obtain a copyright, it follows that they, at least, became public property.

"'Mrs. Stowe's copyright of the last thirteen chapters would doubtless have been valid but for the fact that they subsequently appeared in the November and December numbers of the Atlantic Monthly without notice of such copyright. As we have already held that the copyright of the Atlantic Monthly by Ticknor & Fields did not operate as notice of the right of the author to any article therein appearing, it follows from the case just decided that the appearance of the last thirteen chapters in the Atlantic Monthly vitiated the copyright.'" *Mifflin v. Dutton*. 190 U.S. 266; 47 L.E. 1035, 23 S.C. 803 1903.

121. "The question presented by this case is whether entering for copyright the last two parts of the 'Professor at the Breakfast Table' in the December number of 1859 of the Atlantic Monthly by Ticknor & Fields, proprietors of the magazine, was sufficient to save the rights of the author . . .

"The entry of the Atlantic Monthly by Ticknor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the Atlantic Monthly . . . Had the copyright been entered by Ticknor & Fields, as agents of Dr. Holmes, it is possible it might have been sustained, but there is nothing to indicate that Ticknor & Fields were acting for any one else than themselves; and there is nothing to show that Dr. Holmes ever assented to their copyrighting his work . . .

"But, even assuming that it was done by his authority, there is an additional question whether the entry of a book called the 'Atlantic Monthly Magazine,' in the name of Ticknor & Fields, is equivalent to entering a book called 'The Professor at the Breakfast Table,' by Oliver Wendell Holmes."

". . . without further explanation it might, perhaps, be inferred that the author of a book who places it in the hands of publishers for publication, might be presumed to intend to authorize them to obtain a copyright in their own names . . . it is apparent that there was no such intention in this case . . ." *Mifflin v. White*, 190 U. S. 263; 47 L.E. 1035, 23 S.C. 803. 1903.

122. p. 333. "Under the circumstances of this case and as stated to counsel at the time the consent was given, I cannot conceive that the plaintiff has suffered any actual damages by reason of the infringing acts, and I will therefore allow nominal damages of 6 cents. The use of the printed words with the perforated rolls, as far as these two works were concerned, was discontinued by the defendant at or shortly before the suit was instituted and almost immediately after the practice was begun. The defendant made no extra charge for the printed slips and, so far as appears, realized no profits therefrom." *Mills v. Standard Music*. 223 F. 849 COB 18: 328. 1915.

123. Judge Learned Hand says in this case, re his decision in *Stern v. Remick* (used as basis for same decision in *Cardinal Film v. Beck*) that deposit in Library of Congress is publication, "I must own that what I said there of publication seems to me now open to doubt." *Mittenthal v. Berlin*. 291 F. 714 COB 19: 292. 5823. 1923.

124. p. 522-3. "It is apparent, however, from the pleadings, that plaintiff, under hire by the Knickerbocker Hotel, made the first publication of the murals when she painted them on the walls of the Great Lakes Room where they could be seen and were undoubtedly observed by many persons. Under the settled rule in this and other jurisdictions such publication without copyright divests the owner of an exclusive common law right and the production becomes common property, subject to the free use of the community. In the early case of *Rees v. Peltzer*, 75 Ill. 475, atlases, containing maps of the City of Chicago, were sold to various real estate dealers, and one such atlas was placed in the hands of the city for public use, where any part, or

the whole of it, could be copied and used by any citizen who so desired. The court held such act to be a voluntary publication, divesting the author of any common law right in the atlas, saying: 'It may, however, be now considered as established, that when these products are circulated abroad, and published with the author's consent, they become common property, and subject to the free use of the community; or, in other words, that there is no copyright in a published work at common law, and such copyright exists only by statute.' In *Van Veen v. Franklin Knitting Mills, Inc.*, 145 Misc. 451, 260 N.Y.S. 163, 164, the court posed the question: 'When an owner of a common-law copyright publishes his work in a magazine without copyrighting it under the federal statute, can he by an agreement with the publisher which is unknown to the public prevent the public from reproducing the form of the work which is so published?' and stated: 'The question is answered in the negative.' Again, in *Kipling v. Fenne*, C.C., 106 F. 692, 693, the court said: 'Baldly stated, the proposition advanced is that an author, whose mental productions, prose, verse, and title, have been given to the world by publication without copyright, so that anyone is free to reprint and sell the whole or any part of them, may nevertheless regulate the manner in which such reprinted matter may be grouped and entitled, and may restrain any application of the title he selected otherwise than as he used or uses it. No authority is cited which supports any such proposition. . . . It would seem that the measure of relief which authors may obtain against unauthorized publication of their works must be found in the copyright statutes, which, when availed of, are an abundant protection against such publication.' See also *Banforth v. Douglass Post Card & Machine Co.*, C.C., 58 F. 355, and *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W. 2d 282, 287, wherein a house built in accordance with the plaintiff architect's plans was thereafter open to public inspection with his consent. Although the plans had not been copyrighted the architect sued the defendants for subsequently constructing residences from his plans without his consent and for their own profit. As applicable to these facts the court said: 'Another method (by which publication may be accomplished) is by placing the original on exhibition in a public place . . . where the public may view the same without restriction. . . . But it is universally held that where the work is made available to the public, or any considerable portion thereof, without restriction, there has been a publication,'"

p: 524. "‘There is a logical distinction to be observed in dealing with the effect upon the authors’ rights of the public performance of an unprinted drama and the publication of a printed book.’"

p. 524. "‘As the author has no inherent common-law right to have his name used in connection with his work, his name may be wholly omitted from the work, if the proprietor of it sees fit so to do. . . .’"
Morton v. Raphael. Ill. App. Ct. 79 N.E. 2d 522. 1948.

125. Recompiling and offering to the public, without reprinting or copying, is a violation. *Natl. Geographic v. Classified Geographic. 27 F. S. 655. COB 22: 188. 1939.*

126. p. 346. "It is asserted that the March 1914 issue of ‘Snappy Stories’ was duly copyrighted in February, 1914; but that fact is of no consequence and adds nothing to the plaintiff’s case in view of the previous copyright of Goodman."

p. 347. "Less than an assignment of the entire copyright cannot carry the causes of action (if the right is invaded) which the act accords to the owner or assignee."

p. 347-8. "That Goodman transferred or licensed to plaintiff only a special or limited right is made especially clear by the fact that he sold the dramatic rights to some one else, and this, obviously, he could not have done had he divested himself of his copyright by assignment. It must be remembered throughout that the remedies here sought are statutory creations. They have been made drastic to protect authors against wrongful invasions, but they were not intended to be cumulative, so as to subject a defendant to more than one recovery for the redress of one wrong."

p. 349. "As the suit cannot be maintained under the copyright act and as diversity of citizenship is lacking, the motion to dismiss the bill is granted, with costs."

"NOTE—It will be understood that I am not passing on the question which would be presented if Goodman were a party plaintiff." *New Fiction v. Star. 220 F. 994 COB 18: 344. 1915.*

127. "Congress was conferring a special privilege upon authors and could limit that privilege in any manner it saw fit. In order to secure a valid copyright or a valid patent, it is necessary to comply with every requirement of the law . . ." *N. Y. Times v. Sun. 204 F. 586 (CCA 2) COB 17: 175. 1913.*

128. p. 379. "The Defendant is a shorthand writer, and he attended and took down a copy—almost verbatim—of the lecture in shorthand; which of course he had a perfect right to do. Merely taking down a lecture in shorthand is not a breach of any right at all. The Defendant might take notes of the lecture and use them for the purpose of refreshing his memory, or for any similar purpose he might choose.

"The question here is whether having taken the lecture down he had a right to publish it and for profit. He states that the profits have been very small, but of course I cannot take any notice of that. Whether the profits have been large or small the question of right of publication must be just the same. Now, had he that right or not?" p. 381. "He was, therefore, clearly of opinion, that, when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling." *Nichols v. Pitman*. *L. R. Chancery Div. v. 26*, p. 379, 381. 1884.

129. "The copyright statute was enacted for the protection of property rights and not for the purpose of providing a means by which a penalty could be collected in the nature of damages when in fact there were no damages." *Norm v. Brown*. *D. C. Okl. 26 F. S. 707 COB 22: 198*. 1939.

130. "Even where the hearers were allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they had not obtained the right to sell. *Universal Film Mfg. Co. v. Copperman (CCA) 218 F. 577; Werckmeister v. American Lithographic Co. (CCA) 134 F. 321, Press Pub. Co. v. Monroe (CCA) 73 F. 197 . . .*" *Nutt v. Natl. Institute. 31 F2 238*. 1929.

131. p. 328. Advertising copy supplied by advertisers is not covered by copyright in journal. *Official Aviation Guide v. Am. Aviation. 65 U.S.P.Q. 553 (CCA 7) COB 25: 326*. 1945.

132. Author claims he did not write book but that it was revelation from spirits. Court did not permit him "to change his position for

profit in a law suit . . .” Case dismissed because only author or assign may obtain copyright. *Oliver v. Saint Germain*. 41 F.S. 296 COB 24: 451. 1941.

133. p. 375. “When a book or drama is dedicated to the public, any one may prepare and copyright a motion picture photoplay founded thereon; but such copyright will not give the owner thereof an exclusive right to the motion-picture rights in the book or drama, for it has been held that, although anyone is at liberty to translate or to dramatize a book that has become public property, no translator or dramatizer thereof can obtain an exclusive right to more than his own literary work in translating or dramatizing, and all others are free to do the same, provided they do not appropriate anything original in his work.” *O’Neill v. General Film*. (N.Y. Supr. Ct.) 157 N. Y. S. 1028 COB 18: 361. 1916.

134. Common errors “. . . only serve to show use of plaintiffs book and not necessarily that what they wrote infringed the copyright, for historical facts are not copyrightable per se nor are errors in fact. The plaintiff’s book was designed to convey information to the reader. The defendant authors were as free to read it as anyone else and to acquire from it such information as they could . . . And so far as plaintiff’s copyright is concerned, they could use whatever . . . they gleaned from the book in their own writing provided they did not copy any substantial part of the copyrighted work . . .” Reversed most of lower court decision. *Oxford Book v. College Entrance Book*. (CCA 2) 98 F2 691; COB 22: 202. 1938.

135. “An author, said Hoar, J., in *Keene v. Kimball*, 16 Gray, 549, has at common law a property in his unpublished works, which he may assign, and in the enjoyment of which, equity will protect his assignee as well as himself. This property continues until by publication a right to its use has been conferred upon or dedicated to the public.

“Independently of legislation, the sole proprietorship of a manuscript is in the author and his assigns until he publishes it, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public unless the sole right and liberty of printing, reprinting, publishing, and vending the same is secured to the author or proprietor by copyright. But there may be a limited publication by communication of the contents by reading, representa-

tion, or restricted private circulation which will not abridge the right of the author any further than necessarily results from the nature and extent of such limited use as he has made or allowed others to make of the manuscript or painting, or, as Lord Brougham said in *Jefferys v. Boosey*, 4 H. L. Cas. 961, he may withhold or he may communicate it, and communicating, he may prescribe limitation and impose such restrictions as he please as to the extent of its use, which fully justifies the conclusion in *Keene v. Kimball*, that when a literary proprietor has made a publication in any mode not restricted by any condition, other persons acquire unlimited rights of republishing in any mode in which his publication may enable them to exercise such a right, *Keene v. Kimball*, 16 Gray, 550." *Parton v. Prang. Fed. Cas. #10,784*, 18 Fed. Cas. 1277, 1872.

136. p. 558. "It is not essential to the existence of infringement that there be intention to infringe or that the exhibitions be for profit." *Pathe v. Int. Alliance*. 3 F.S. 63. COB 20: 555. 1932.

137. Publication without notice is dedication to the public and defeats all subsequent efforts to obtain copyright. *Penn Sportservice v. Goldstein*. COB 23: 234. 1940.

138. "A copyright gives the author or the publisher the exclusive right of multiplying copies . . . It follows that to infringe this right a substantial copy of the whole or of a material part must be produced." *Perris v. Hexamer*. 99 U.S. 675-6. 1878.

139. p. 401. "Whoever elects to avail himself of the statute, however, must be held to have abandoned his common-law right." *Photo-Drama v. Social Uplift Film*. (CCA 2) 220 F. 448 COB 18: 398. 1915.

140. Common law v. Statutory copyright. "These statutes secure and regulate the exclusive property in the future publication of the work after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publication." *Press Pub. Co. v. Monroe*. 73 F. 199 (CCA 2) 1896.

141. "In the *Dun* case . . . the court did find . . . some infringement, but held that the same was so insignificant in proportion as not to require the plaintiff to be left to his remedy at law." *Produce Reporter v. Fruit Produce Rating*. 1 F2 58 COB 20: 583. 1924.

142. Contract authorizing plaintiff to copy items from the Times of London, did not give the plaintiff any authority to copyright in this country. *Public Ledger v. N. Y. Times.* (CCA 2) 279 F. 707 COB 19: 312. 1922.

143. "Not being an 'author,' the plaintiff concedes that it must be 'proprietor' of the literary property . . . in order to secure a valid copyright in the United States, and so of course the statute requires." Licensee cannot obtain copyright, but there must be full assignment of the literary property. (Supreme Ct. in *Am. Tobacco v. Werckmeister.*)

p. 564. A contract permitting the plaintiff to make copies did not convey the literary property. *Public Ledger v. N. Y. Times.* 275 F. 563. 1921.

144. p. 316. "The Constitution . . . empowers the Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Art. 1, Sec. 8, Cl. 8). It does not, however, provide that Congress may secure copyrights to anyone who thinks or whose officer thinks, it is entitled to it . . . The Public Ledger was not the author or the assign of the author."

p. 317. Even though the assign owned 95 per cent of the stock of the corporation, that did not make the corporation the "proprietor." *Public Ledger v. Post.* 294 F. 430 (CCA 8) COB 19: 313. 1923.

145. "It may be observed that in making a mere contract for printing and publishing a work, it is not usual to say anything about the copyright. That is ordinarily retained by the author, unless there be an agreement or understanding, that the name of the publisher shall be used for that purpose." *Pulte v. Derby.* Case No. 11465 F. Cas. 20, p. 51. 1852.

146. Public display of a painting at a State University was publication. *Pushman v. N. Y. Graphic.* 25 N.Y.S. 2d 32 COB 24: 472, 475. 1941, 1942.

147. Right to make a copy v. right to print. "The defendant Shebbeare, by his answer, stated, that the defendant Francis Gwynne had informed him that the said Henry, Earl of Clarendon, so long since as thirty-three years, delivered to his the said defendant's, Gwynne's, late father, to whom he was administrator, the original

MS. of the history, that he might take a copy thereof, and make use of the same as he should think fit, of which a copy was taken. He admitted the agreement with Gwynne, and insisted upon his right. "The Lord Keeper continued the injunction to the hearing. He said, that it was not to be presumed that Lord Clarendon, when he gave a copy of his work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; that Mr. Gwynne might make every use of it, except that." *Queensberry v. Shebbeare*. *Eden's Chancery Reports* 330, 1758.

148. "... in pleading a case of infringement, the plaintiff must show title, not merely by broad allegation of proprietorship, but by setting forth facts which indicate how he became proprietor . . . a mere licensee is not a proprietor and has no right to take out copyright." *Quinn-Brown v. Chilton*. 15 F.S. 213 COB 21: 250. 1936.

149. "... the plaintiff's case must fail, because the copyright in question either never became effective by reason of failure to give the proper notice, or was lost by reason of failure to repeat when the copyright matter was republished." *Record & Guide v. Bromley*. 175 F. 159. 1909.

150. "... it is against a commercial as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed." *Remick v. Am. Auto.* (CCA 6) 5 F2 411 COB 20: 587. 1925.

151. "While these statutes 'should be given a fair and reasonable construction' with a view to protecting the author in such manner that he may have the benefit of the property right conferred for a limited period of years . . . it is clear that this protection should not be extended beyond the express language of the statute, nor a property right created which was clearly not within the mind of Congress when the act was passed." *Remick v. Am. Automobile Accessories*. 298 F. 628 COB 19: 351. 1924.

152 "The Constitution (Article 1, Sec. 8, cl. 8) securing to 'authors and inventors' alike 'the exclusive right to their respective writings and discoveries,' the right of any other person to a copyright is derivative and secondary, and such latter must therefore, show

that he is the grantee of the author's rights." *Saake v. Lederer*. 174F. 136 (CCA 3), 1909.

153. "So, also, it is clear that, under some circumstances and for certain purposes, a subsequent publisher may draw from the earlier publication its identical words, and make use of them. This is peculiarly so with reference to works in regard to the arts and sciences, using those words in the broadest sense, because, with reference to them, any publication is given out as a development in the way of progress, and, to a certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art or science may commence where the prior author stopped. This includes medical and legal publications, in which the entire community has an interest, and which the authors are supposed to give forth, not only for their own pecuniary profit, but for the advancement of science. Therefore, as to copyrighted works of that character, by the common consent to which we have referred, subsequent authors are sometimes entitled, and, indeed, required, to make use of what precedes them in the precise form in which last exhibited" *Sampson v. Seaver*. 140 F. 541 (CCA 1), 1905.

154. Special case of limited distribution of reprint. *Schellberg v. Emphringham*. 36 F2, 991 COB 20: 636. 1929.

155. p. 760. "The rule of dedication and abandonment has been applied to abstract books and records. When the owner furnishes an abstract of title to the general public, this amounts to a publication as to the particular information contained therein, and deprives him of the exclusive right thereafter to multiply copies thereof, or to prevent others from doing so. *Vernon Abstract Co. v. Waggoner Title Co., et al.*, 49 Tex. Div. App. 144, 107 S.W. 919." *Schleman v. Guaranty Title* 15 S. 2, 754. 1943.

156. "Only the use of the material and substantial part of the copyright work is an infringement."

Fair use is defined, on p. 658 as "one that is reasonable and customary." *Shapiro, Bernstein v. Collier*. 26 U.S.P.Q. 40 COB 20: 656, 660. 1934.

157. "In defining that zone it always has to be determined: (1) whether some part of the zone claimed is not a part of the common ground, the heritage of all mankind, usually referred to as the public

domain; or (2) whether some of the infringement claimed is not of matter which is not protected by copyright for some other reason." *Sheldon v. Metro-Goldwyn*. 7 F.S. 843 COB 20: 674. 1934.

158. "... the plaintiff did not dedicate his work to the public by permitting Col. Moss to use it and did not thereby lose his right to copyright." (Plaintiff had sold Col. Moss the right to use a part of his work in Col. Moss' book.) *Sherrill v. Grieves*. (D.C. Supreme Ct.) 57 Wash. L.R. 286, COB 20: 689. 1929.

159. Noncopyrightable material cannot be covered by copyright. *Shipman v. RKO*. 20 F.S. 249. Affirmed 100 F2 533. COB 21: 273. 1937.

160. p. 857. "With reference to plaintiffs' claim of the appropriation of an idea, it must be borne in mind that there is no property right in an idea as such, but only in the expression of the idea . . ." *Shubert v. Columbia*. 72 N.Y.S. 2, 851. 1947.

161. p. 578. "The wrong which is alleged here is the use of plaintiffs' music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology. The logical development of this theory leads inescapably to the Doctrine of Moral Right (53 Harvard Law Review). There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the Doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. *Clemens v. Belford Clark & Co.*, supra. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a

wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory. The motion is accordingly denied in all respects." *Shostakovich v. Twentieth Century*. *S.Ct.N.Y.* 80 *N.Y.S.* 2, 575. 1948.

162. p. 567. Copyright owners by failing to include prescribed copyright notice in new edition . . . were deemed to have abandoned copyright regardless of insistence that it was not their intention to do so.

p. 569. Copying 4.2 square inches of 12,440 square inches did not constitute copying of substantial and material part. *Sieff v. Continental*. 39 *F.S.* 683. *COB* 24: 567. 1941.

163. ". . . under the act no power exists in an 'agent' to copyright anything; that privilege is reserved to 'authors or proprietors.'" *Société des Films v. Vitagraph*. (*CCA* 2) 251 *F.* 258 *COB* 19: 378. 1918.

164. p. 504. "Materials used in a composition may be 'old and in the public domain,' but a copyright thereof will protect 'the particular plan, arrangement, and combination' of the author."

p. 507. "Publication of a literary work is effected by communicating or dedicating it to the public. This is known as a 'general publication.' There is also a 'limited publication' which is one that 'communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public.' *Werckmeister v. American Lithographic Co.*, 2 *Cir.*, 134 *F.* 321, 324. 'When a literary work is exhibited for a particular purpose, or to a limited number of persons' it does not thereby become *publici juris* and the author retains ownership of the work until he relinquishes it either by contract or by an 'unequivocal act indicating an intent to dedicate it to the public.'" *Stanley v. C.B.S.* (*CCA*) 192 *P2*, 495. 1948.

165. p. 421. "The purpose in requiring publication of notice of copyrighting is to prevent innocent persons from suffering the penalty of the statute for reproduction of the copyrighted article. (*Sarony v. Burrows-Giles Lithographic Co.*, *C.C.*, 17 *Fed.* 591, affirmed 111 *U.S.* 53, 4 *Sup. Ct.* 279, 28 *L. Ed.* 349.)" *Stecher v. Dunston*. 233 *F.* 601 *COB* 18: 418. 1916.

166. p. 530. "Even the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the

work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are two separate and distinct interests." *Stephens v. Cady*. 14 Howard 528, 530, 1852; 14 L.E. 528 (cites earlier decisions to this effect).

167. p. 530. "The copy-right is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar v. Taylor* (4 Burr. 2396) 'a property in notion, and has no corporeal tangible substance.'"

p. 530. "Even the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are two separate and distinct interests. 4 Burr., 2330, 2396; 2 Eden, 329; 2 Atk., 342; 2 Story. 100."

p. 531. "But the property in the copy-right is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer." *Stephens v. Cady*. *Supreme Court* 530, 531. December, 1852.

168. p. 283. Deposit of two copies in the Library of Congress is publication, cites several cases. Judge Hand interprets *Boucicault v. Hart*, as saying, in effect, ". . . if you are to get the monopoly, you must give the public your work within a reasonable time, so that they may get their consideration for the monopoly you claim. You may not file your title, and stop there indefinitely."

p. 284. "'A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public.'"

"On page 325 of 134 Fed., and page 557 of 69 C.C.A. (68 L.R.A. 591), the learned judge says: 'The unrestricted offer of even a single copy to the public implies the surrender of the common-law right.' Certainly under this language, either the deposit, or the sale of the single copy to Ditson, was a publication." *Stern v. Remick*. 175 F. 283, 284. 1910.

169. "Nor does the rule that he who grants a thing, grants impliedly what is essential to the beneficial use of that thing, apply to this case. A press, paper, and ink, are essential to the beneficial use of a copperplate. But it would hardly be contended that the sale of a copperplate passed a press, and paper, and ink, as incidents of the plate, because necessary to its enjoyment.

"The sale of a copperplate passes the right to such lawful use thereof as the purchaser can make, by reason of the ownership of the thing he has bought; but not the right to a use thereof, by reason of the ownership of something else which he has not bought, and which belongs to a third person. If he has not acquired a press, or paper, or ink, he cannot use his plate for printing, because each of these kinds of property is necessary to enable him to use it for that purpose. So, if he has not acquired the right to print the map, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper and ink, or as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the limited time, during which the exclusive right exists shall have expired, and then use it to print maps. He may sell it to another, who has the right to print and publish, but he can no more use that right of property than he can use a press or paper, which belongs to a third person." *Stevens v. Gladding. Supreme Court, 452-3. December, 1854.*

170. Entrusting a manuscript to a broker does not authorize broker to sell copyright privilege. *Stodart v. Mutual Film. 249 F. 507 COB 19: 386. 1917.*

171. p. 222. "It is the general rule that a person has no property right in an idea which is not novel, not subject to copyright, or not patentable. Likewise, an idea which never takes concrete form at the time of disclosure, even if novel, is not the subject of a property right or of contract." *Stone v. Loew. 63 N.Y.S. 2, 220. 1946.*

172. p. 189. "Complainant has copyrighted a book and not an advertisement. Defendants have published an advertisement and not a book. The book is in the nature of a manual of instruction and is designed to teach piano dealers how to attractively advertise their wares and contains forms, or models, or diagrams of advertisements, just as we may choose to term them. If complainant had published

and copyrighted a manual of instruction designed to teach piano makers how to build instruments, any person would be entitled to follow the instructions and diagrams to construct a piano. I can see no distinction between a system of instruction as to how to make a piano and a system of instruction as to how to draw an advertisement. The copyright of the book did not prevent the general public from making use of the book for the purpose for which it was designed, notwithstanding such use results in the publication of a part of the book in the form of an advertisement. In my opinion the case is on all fours with the decision in *Baker v. Selden*, 101 U.S. 99, 25 L. Ed. 841." *Stone & McCarrick v. Dugan Piano Co.* 210 F.399 COB 17: 188. 1914.

173. p. 190. "This court, in the case of *Bobbs-Merrill Co. v. Straus* . . . held that the copyright act did not grant the right to fix a limitation upon prices of books at subsequent sales to purchasers from retailers by notice of price limitation inscribed upon the book, and, construing the copyright act, held that, in conferring the right to vend a book, it did not intend to confer upon the holder of the copyright any further right after he had exercised the right to vend secured to him by the act." *Straus v. Am. Publishers.* 231 U.S. 222 COB 17:190. 1913.

174. p. 510. "Photographic reproductions of portions of the copyrighted work also constitute infringement, *R. R. Donnelley & Son Co. v. Haber*, 43 F.S. 456, 457, 458. "In *Farmer v. Elstner*, C.C., E.D. Mich., 33 F. 494, 495, Judge Brown, later Supreme Court Justice, said: 'Where defendant's publication is designed to rival or compete with the plaintiff's market, courts are astute to protect the technical rights of the plaintiff to his composition . . .'" *Subcontractors Register v. McGovern.* 69 F.S. 507. 1946.

175. "The publication . . . prior to . . . copyright . . . was a dedication to the public . . ." *Superfine v. Denny.* 54 F.S. 148 COB 25: 408. 1943.

176. "It cannot be doubted that the copyright owner who might elect to publish without any copyright notice and thereby forego whatever protection that would give could also authorize the defendant so to publish." *Swift v. Collegian Press.* 131 F2 902 (CCA 2) 1942.

177. "... the defendant does not in fact possess, and has no right to perform Gounods 'Redemption' as set for orchestra. If he should have the opportunity to copy it he would not be premitted to perform it." *Thomas v. Lennon*. 14 F. 852. 1883.

178. p. 926. "An author who has pirated a large part of his work from others is not entitled to have his copyright protected." *Thompson v. Am. Law Book*. 122 F. 922 (CCA 2) 1903.

179. The Bonneville case. Multiple copies of maps made for government use. Individuals charged 250 dollars statutory damages. *Towle v. Ross*. 32 F.S. 125 COB 23: 321. 1940.

180. "... literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner,—a right well exemplified in *Publishing Co. v. Monroe*, 19 C.C.A. 429, 73 Fed. 196, 38 U.S. App. 410. With voluntary publication the exclusive right is determined at common law, and the statutory copyright is the sole dependence of the author or owner for a monopoly in the future publication." *Tribune v. Associated Press*. 116 F. 127. 1900.

181. p. 929. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S. Ct. 546, 547, 46 L. Ed. 1010, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright." *U.S. v. Paramount*. 68 S.C. 915. 1948.

182. Publication of copyright notice on last page did not comply with the statute and the publication was therefore not copyrighted. *United Thrift Plan v. National Thrift Plan*. 34 F2 300 COB 20: 739. 1929.

183. p. 201. "Around this method of procuring copyright has grown a great body of case law, the sum of which is that publication with notice of copyright is the essence of compliance with the statute,

and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection."

p. 202. "If there be dissemination of the thing under consideration among the public as to justify the belief that it took place with the intention of rendering the work common property, then publication occurred." *Universal v. Copperman*. 212 F. 301 COB 17: 199. 1914.

184. p. 378. "Award of statutory damages in the terms of the statute is proper only in the absence of proof of actual damages and profits. The court having found the extent of both, the point fails. The court awarded actual damages, holding the award on that basis as adequate without resorting to the use of statutory damages. We find no error in this course. Such conclusion is in accord with cases from which we quote briefly. Lloyd cites *Fargo Mercantile Co. v. Brechet & Richter Co.*, 8 Cir., 295 F. 823, 829: "We think election to award what are known as statutory damages in lieu of actual damages vests with the court and that it is for the court to decide what kind of damages best fits the case.' We submit that the court made its election. In *Turner & Dahnken v. Crowley*, 9 Cir., 252 F. 749, 754, the court states: 'The duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial.'" *Universal v. Lloyd*. (CCA 9) 162 F2 354. 1947.

185. "When an owner of a common-law copyright publishes his work in a magazine without copyrighting it under federal statute, can he by an agreement with the publisher . . . prevent the public from reproducing the form of the work which is so published? The question is answered in the negative." *Van Veen v. Franklin*. 260 N.Y.S. 163. 1932.

186. p. 526. "Plaintiff advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called 'moral rights' of the author, said to be those necessary for the protection of his honor and integrity. These so-called 'moral rights,' so we are informed, are recognized by the civil law of certain foreign countries . . ."

"The conception of moral rights of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States . . ." *Vargas v. Esquire*. (CCA 7) 164 F2 523. 1947.

187. p. 426. Issue of magazine carried story after which magazine went out of business and did not pay for story. Author sold it to the defendant. While there was no deliberate or willful infringement and no damage, court found against defendant. CCA stated that prompt deposit is required to secure copyright to avoid entrapment. (Reversed.)

p. 22. "Appellee's failure to comply with the act . . . coupled with discontinuance of publication of its magazine and apparent abandonment of its copyright, produced just such a result as Section 12 was designed to prevent." (Cites Weil, *American Copyright*, 1917, p. 313.)

Reversed by Supreme Court as to prompt deposit, which states that delay in deposit does not void copyright, but does not speak to the question of abandonment, nor as to whether the author of the article had ever assigned it to the copyright proprietor. *Pearson v. Washingtonian*. CCA D.C. COB 22: 207. 1938. *Washingtonian v. Pearson*. 59 S.C.R. 397, 306 U.S. 30 COB 22: 207. 1939. COB 25: 426. 1944.

188. "The owner of the common law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto enjoy the benefit of a restricted publication (without forfeiture of the right of general publication). Thus, he may communicate the contents of his work under restrictions without forfeiture of the right. This communication of contents under restriction, known as restricted or limited publication is illustrated by lectures to classes of students, dramatic performances before a select audience, exhibitions of paintings in private galleries, private circulation of copies of manuscripts, etc."

p. 326. "A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public." *Werckmeister v. American Lithographic*

Co. 134 F. 323, (CCA 2) (69 CCA 553, 555), 68 L.R.A. 591. 1904.

189. p. 854. "... a law reporter was entitled to obtain a copyright for the matter which was the result of his own intellectual labor, including the title page, table of cases, any headnotes or syllabi, the statement of facts, argument of counsel and index. But the court also said . . . that the rights obtained by copyright did not cover the opinions of the courts, nor the official statements of fact and syllabi, if prepared by the court itself."

p. 861. "The public are entitled to make any use of a copyrighted book which does not amount to a violation of the exclusive right given by the statute.

"Anything less than a substantial copy of the whole or a material part of the book does not violate the exclusive right given by statute . .

"Hence, any one may copy less than a material part of a copyright book; i. e., he may make a fair use of it."

p. 861. "Several classes of cases of copying have been held to be fair and hence not an infringement . . . Perhaps others will be recognized when they arise. Each case depends upon the particular circumstances . . . All uses of a book are dedicated to the public by publication, except such as are reserved by the statutes."

p. 865-6. "It does not seem to the court that the owner of a copyright is entitled to equitable relief against another publication solely because the writer of that other publication may have saved a certain amount of stenographic labor, or of manual handwriting, by cutting or copying the words of the citations from the digests, where no literary ability is appropriated in the arrangement or collection of the cases themselves. So an Encyclopedia writer, who has formulated a proposition of texts and directs his stenographer to add to that text the citations shown by all of the digests, would not be guilty of infringement, and would not thereby make himself liable to a decree of equity, if, after proper research and verification, he merely for convenience used the printed words in making up the article, instead of having the stenographer rewrite the same at his dictation, with the original books in his hands when dictating, instead of having been examined and laid aside when the citation was found to be correct. "An extension of the same idea applies to the dictation or quotation of digest paragraphs and syllabus headnotes, after an examination of the original cases, and verification of these paragraphs or headnotes in

the official publications, or in works as to which rights of copyright may have been lost.

“The necessary advance in any science, and the very purpose for which text-books and legal publications are prepared, contemplates, to a certain extent, the dissemination of knowledge and improvement in the literature of the science, which is open to a subsequent writer as much as to a lawyer or judge, who is earning his living partly by the use of copyrighted books. The words ‘unfair use,’ while having a broader meaning with respect to the appropriation of earlier writings by a work covering substantially the same ground, and supplanting the earlier book, than they have in the acquirement of knowledge upon the part of a student of the field treated by the publication, cannot, nevertheless, be arbitrarily made to be equivalent to no use at all, outside of consultation, in verifying the ground covered and the subjects or cases comprised in the earlier work. Such construction would mean that a later work would be no advance upon the earlier work, unless the writer had superior training or greater ability in doing the same thing which the earlier writer had attempted, and the improvement and advancement in the science itself would thus be sacrificed, and the writers of books would be deprived of the proper growth in knowledge, and from taking advantage of the position to which the earlier writers had carried the science under consideration.” p. 878. • “In the case of *Mifflin v. Dutton*, the ‘Minister’s Wooing,’ by Mrs. Harriet Beecher Stowe, was the subject of the case. It appeared that, of the 42 chapters, 29 had been published in the *Atlantic Monthly*, without notice of copyright. The last 13 had been included in the magazine. But the book as a whole was published between the appearance of the first 29 chapters and the appearance of the last 13. The court held that the copyright attempted to be taken out by Mrs. Stowe for the entire book was invalidated as to the first 29 chapters, in that these chapters had been previously printed in the *Atlantic Monthly* without copyright notice, and her rights to the remaining portion of the book—that is, the last 13 chapters,—were lost by her acquiescence in and permission to the magazine to publish that part of her work, without repeating the notice of her copyright, under the provisions of section 5 of the statute then in effect (Act. Feb. 3, 1831, 4 Stat. 436, c. 16), requiring an insertion in the several copies of each and every edition published during the term secured of information by the appropriate notice of the copy-

right." *West Publishing Co. v. Thompson*. 169 F. 854, 861, 865-6, 878. 1909.

190. p. 835. "Taken together, we think these provisions show that there can be but one copyright for the same book."

p. 838. "But a fair use of copyrighted material in a different publication may be broader. Suppose one were to issue a map of Kansas showing the annual amount and value of the chief products of each county. Could not a person writing a history of Kansas take those amounts and values bodily into his text? May not one reprint out of a copyrighted compilation of English love songs open to the public one or more for use in a work on English literature? We think there is great difference between text-books and volumes of reported cases or digests of those cases. The encyclopedias under consideration are really collections of text-books. The headnotes of reported cases are a digest of the law and facts of those cases, and digest of headnotes of various cases constitute collections and classified arrangements of decisions. On the other hand, a text-book states the principles of law and refers generally in footnotes to cases supporting or illustrating the propositions in the text. A poem or a novel or a history or a directory or a dictionary or a scientific treatise is intended to please, interest, instruct, or satisfy the reader, so to speak, in itself; but a digest considered by itself is nothing. Its purpose is as a tool to enable judges to write their opinions, lawyers to write their briefs, and authors to write their text-books. Such person may cut out parts of the digests to assist them in running down the cases and copy lists of cases from the digests, as many of the defendant's writers have done. Such a use of the digests seems to us, differing in this respect from the court below, to fall directly within the purpose for which they are sold, and to be fair. On the other hand, extensive copying or paraphrasing of the language of the syllabi would not, we think be a fair use." *West v. Thompson*. 176 F. 835, 838 (CCA 2) 1910.

191. "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall

have published it to the world." *Wheaton v. Peters*. 33 U. S. 657, 8 L.Ed. 1005. 1834.

192. "... publication without notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection." *Wildman v. N.Y. Times*. 42 F. S. 412 COB 24: 661. 1941.

193. p. 219. "The fact that he did secure all this material from other publications which were not copyrighted does not, to my mind, prevent him from getting a copyright upon this map, if it constitutes a new arrangement of old material . . ."

p. 222. "The anomalous provision in this section is this: That the court may in lieu of actual damages and profits in its discretion allow such damages as shall appear to be just, yet it apparently requires such damages in this case to be \$250. But it cannot be possible that, where the court is of the opinion that there were no damages at all, it still is bound to allow \$250, and that, where the court is of the opinion that it would be a matter of injustice to allow even \$1, it would be compelled by law to allow \$250. Some other construction must be given to that provision. I think it means that where the court is satisfied that there are substantial damages, but the evidence is incomplete or is insufficient, so that the court cannot determine just what the damages are, then it may allow them on that basis. But wherever the court is of the opinion that the damages cannot be more than \$50 or \$100 it should not allow \$250." *Woodman v. Lydiard*. 192 F. 67 COB 17: 217. 1912.

194. p. 889. "The act of publication is the act of the author . . . and, when the latter has permitted the work to be filed in a public office . . . we are of the opinion that . . . the plaintiff has published his work to the world, and can have no exclusive right in the design, or in the reproduction." *Wright v. Eisle*. 83 N.Y.S. 887 (N.Y. Supreme Ct.) 1903

195. "It is only to 'authors or inventors,' or to persons representing the author or inventor, that Congress is authorized by the constitution to grant a copyright. Const. Art. 1, par. 8. The right of any other person than the author or inventor must therefore be a purely secondary and derivative one, and in enforcing any alleged copyright such a

person must show an exclusive right lawfully derived from the author . . ."

p. 106. "To a mere owner of a work as such, to a 'proprietor' in that sense only, without any express or implied transfer from the author or inventor of his right to a copyright, congress . . . is not by the constitution vested with the power to grant a copyright." *Yuengling v. Schile*. 12 F. 100-101, 106 S.D. N.Y. 1882.

196. "Gentlemen's agreement." Copyright in Photographic Reproduction. *Library Journal*, 60: 763-4. October 1, 1935.

The Constitutional Provision Respecting Copyright

The Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (U.S. Const. Art. 1, § 8.)

Copyright Law

OF THE UNITED STATES OF AMERICA

United States Code

Title 17—Copyrights¹

Chap.	Sec.
1. Registration of copyright.....	1
2. Infringement proceedings.....	101
3. Copyright Office.....	201

Chapter 1—Registration of Copyrights

- §1. Exclusive rights as to copyrighted works.
- §2. Rights of author or proprietor of unpublished work.
- §3. Protection of component parts of work copyrighted; composite works or periodicals.
- §4. All writings of author included.
- §5. Classification of works for registration.
- §6. Registration of prints and labels.
- §7. Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected.
- §8. Copyright not to subsist in works in public domain, or published prior to

¹Act of July 30, 1947 (61 Stat. 652). The enacting clause provides that Title 17 of the United States Code entitled "Copyrights" is codified and enacted into positive law and may be cited as "Title 17, U. S. C., §—". The Act of April 27, 1948 (62 Stat. 202) amended sections 211 and 215. The Act of June 25, 1948 (62 Stat. 869) repealed sections 101 (f), 102, 103, 110 and 111. The Act of June 3, 1949 (63 Stat. 153) amended sections 16, 22, 23 and 215.

- July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material.
- §9. Authors or proprietors, entitled; aliens.
 - §10. Publication of work with notice.
 - §11. Registration of claim and issuance of certificate.
 - §12. Work not reproduced for sale.
 - §13. Deposit of copies after publication; action or proceeding for infringement.
 - §14. Same; failure to deposit; demand; penalty.
 - §15. Same; postmaster's receipt; transmission by mail without cost.
 - §16. Mechanical work to be done in United States.
 - §17. Affidavit to accompany copies.
 - §18. Making false affidavit.
 - §19. Notice; form.
 - §20. Same; place of application of; one notice in each volume or number of newspaper or periodical.
 - §21. Same; effect of accidental omission from copy or copies.
 - §22. Ad interim protection of book or periodical published abroad.
 - §23. Same; extension to full term.
 - §24. Duration; renewal and extension.
 - §25. Renewal of copyrights registered in Patent Office under repealed law.
 - §26. Terms defined.
 - §27. Copyright distinct from property in object copyrighted; effect of sale of object, and of assignment of copyright.
 - §28. Assignments and bequests.
 - §29. Same; executed in foreign country; acknowledgment and certificate.
 - §30. Same; record.
 - §31. Same; certificate of record.
 - §32. Same; use of name of assignee in notice.

§1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition

himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

§3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED; COMPOSITE WORKS OR PERIODICALS.—The copyright provided by this title² shall protect all the copyrightable component parts of the work copyrighted, and all matter therein which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he will have if each part were individually copyrighted under this title.

§4. ALL WRITINGS OF AUTHOR INCLUDED.—The works for which copyright may be secured under this title shall include all the writings of an author.

§5. CLASSIFICATION OF WORKS FOR REGISTRATION.—The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

²So in original. Probably should read "title".

- (a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.
- (b) Periodicals, including newspapers.
- (c) Lectures, sermons, addresses (prepared for oral delivery).
- (d) Dramatic or dramatico-musical compositions.
- (e) Musical compositions.
- (f) Maps.
- (g) Works of art; models or designs for works of art.
- (h) Reproductions of a work of art.
- (i) Drawings or plastic works of a scientific or technical character.
- (j) Photographs.
- (k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.
- (l) Motion-picture photoplays.
- (m) Motion pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title.

§6. REGISTRATION OF PRINTS AND LABELS.—Commencing July 1, 1940, the Register of Copyrights is charged with the registration of claims to copyright properly presented, in all prints and labels published in connection with the sale or advertisement of articles of merchandise, including all claims to copyright in prints and labels pending in the Patent Office and uncleared at the close of business June 30, 1940. There shall be paid for registering a claim of copyright in any such print or label not a trade-mark \$6, which sum shall cover the expense of furnishing a certificate of such registration, under the seal of the Copyright Office, to the claimant of copyright.

§7. COPYRIGHT ON COMPILATIONS OF WORKS IN PUBLIC DOMAIN OR OF COPYRIGHTED WORKS; SUBSISTING COPYRIGHTS NOT AFFECTED.—Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright

upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

§8. COPYRIGHT NOT TO SUBSIST IN WORKS IN PUBLIC DOMAIN, OR PUBLISHED PRIOR TO JULY 1, 1909, AND NOT ALREADY COPYRIGHTED, OR GOVERNMENT PUBLICATIONS; PUBLICATIONS BY GOVERNMENT OF COPYRIGHTED MATERIAL.—No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: *Provided*, That copyright may be secured by the Postmaster General on behalf of the United States in the whole or any part of the publications authorized by section 1 of the Act of June³ 27, 1938 (39 U. S. C. 371).

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

§9. AUTHORS OR PROPRIETORS, ENTITLED; ALIENS.—The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title: *Provided, however*, That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such

³So in original. Probably should be "January".

foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require: *Provided*, That whenever the President shall find that the authors, copyright owners, or proprietors of works first produced or published abroad, and subject to copyright or to renewal of copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities by authors, copyright owners, or proprietors who are citizens of the United States or who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States: *Provided further*, That no liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require.

§10. PUBLICATION OF WORK WITH NOTICE.—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title.

§11. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE.

—Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

§12. WORKS NOT REPRODUCED FOR SALE.—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work by a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale.

§13. DEPOSIT OF COPIES AFTER PUBLICATION; ACTION OR PROCEEDING FOR INFRINGEMENT.—After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section 16 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or

proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

§14. SAME; FAILURE TO DEPOSIT; DEMAND; PENALTY.—Should the copies called for by section 13 of this title not be promptly deposited as provided in this title, the Register of Copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of \$100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

§15. SAME; POSTMASTER'S RECEIPT; TRANSMISSION BY MAIL WITHOUT COST.—The postmaster to whom are delivered the articles deposited as provided in sections 12 and 13 of this title shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.

§16. MECHANICAL WORK TO BE DONE IN UNITED STATES.⁴—Of the printed book or periodical specified in section 5, subsections (a) and (b), of this title, except the original text of a book or periodical of foreign origin in a language or languages other than English, the text of all copies accorded protection under this title, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photoengravings,

⁴Section 16 as amended by the Act of June 3, 1949 (63 Stat. 153).

except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: *Provided, however,* That said requirements shall not apply to works in raised characters for the use of the blind, or to books or periodicals of foreign origin in a language or languages other than English, or to works printed or produced in the United States by any other process than those above specified in this section, or to copies of books or periodicals, of foreign origin, in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title: *Provided further,* That the provisions of this section shall not affect the right of importation under the provisions of section 107 of this title, nor the extension of time within which to comply with conditions and formalities granted by Presidential proclamation, No. 2608, of March 14, 1944.

§17. AFFIDAVIT TO ACCOMPANY COPIES.—In the case of the book the copies so deposited shall be accompanied by an affidavit under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photoengraving process, that such process was wholly performed within the limits of the United States and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photoengraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication.

§18. MAKING FALSE AFFIDAVIT.—Any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$1,000, and all of his rights and privileges under said copyright shall thereafter be forfeited.

§19. NOTICE; FORM.—The notice of copyright required by section 10 of this title shall consist either of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: "Entered according to Act of Congress, in the year—, by A. B., in the office of the Librarian of Congress, at Washington"; or, at his option, the word "Copyright", together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19—, by A. B."

§20. SAME; PLACE OF APPLICATION OF; ONE NOTICE IN EACH VOLUME OR NUMBER OF NEWSPAPER OR PERIODICAL.—The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

§21. SAME; EFFECT OF ACCIDENTAL OMISSION FROM COPY OR COPIES.—Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by

accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

§22. AD INTERIM PROTECTION OF BOOK OR PERIODICAL PUBLISHER ABROAD.⁵—In the case of a book or periodical first published abroad in the English language, the deposit in the Copyright Office, not later than six months after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book or periodical, shall secure to the author or proprietor an ad interim copyright therein, which shall have all the force and effect given to copyright by this title, and shall endure until the expiration of five years after the date of first publication abroad.

§23. SAME; EXTENSION TO FULL TERM.⁵—Whenever within the period of such ad interim protection an authorized edition of such books or periodicals shall be published within the United States, in accordance with the manufacturing provisions specified in section 16 of this title, and whenever the provisions of this title as to deposit of copies, registration, filing of affidavits, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book or periodical for the term provided in this title.

§24. DURATION; RENEWAL AND EXTENSION.—The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work

⁵Sections 22 and 23 as amended by the Act of June 3, 1949 (63 Stat. 153).

copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

§25. RENEWAL OF COPYRIGHTS REGISTERED IN PATENT OFFICE UNDER REPEALED LAW.—Subsisting copyrights originally registered in the Patent Office prior to July 1, 1940, under section 3 of the act of June 18, 1874, shall be subject to renewal in behalf of the proprietor upon application made to the Register of Copyrights within one year prior to the expiration of the original term of twenty-eight years.

§26. TERMS DEFINED.—In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

§27. COPYRIGHT DISTINCT FROM PROPERTY IN OBJECT COPYRIGHTED; EFFECT OF SALE OF OBJECT, AND OF ASSIGNMENT OF COPYRIGHT.—The copyright is distinct from the property in the

material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

§28. ASSIGNMENTS AND BEQUESTS.—Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

§29. SAME; EXECUTED IN FOREIGN COUNTRY; ACKNOWLEDGMENT AND CERTIFICATE.—Every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

§30. SAME; RECORD.—Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

§31. SAME; CERTIFICATE OF RECORD.—The Register of Copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the copyright office, and upon the payment of the fee prescribed by this title he shall furnish to any person requesting the same a certified copy thereof under the said seal.

§32. SAME; USE OF NAME OF ASSIGNEE IN NOTICE.—When an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this title.

Chapter 2—Infringement Proceedings

§ 101. Infringement:

- (a) Injunction.
 - (b) Damages and profits; amounts; other remedies.
 - (c) Impounding during action.
 - (d) Destruction of infringing copies and plates.
 - (e) Royalties for use of mechanical reproduction of musical works.
 - (f) Rules of procedure. [*REPEALED*].
- § 102. Jurisdiction of courts in enforcing remedies. [*REPEALED*].
- § 103. Joinder of proceedings for different remedies. [*REPEALED*].
- § 104. Willful infringement for profit.
- § 105. Fraudulent notice of copyright, or removal or alteration of notice.
- § 106. Importation of article bearing false notice or piratical copies of copyrighted work.
- § 107. Importation, during existence of copyright, of piratical copies, or of copies not produced in accordance with section 16 of this title.
- § 108. Forfeiture and destruction of articles prohibited importation.
- § 109. Importation of prohibited articles; regulations; proof of deposit of copies by complainants.
- § 110. Jurisdiction of actions under laws. [*REPEALED*].
- § 111. District in which actions may be brought. [*REPEALED*].
- § 112. Injunctions; service and enforcement.
- § 113. Transmission of certified copies of papers for enforcement of injunction by other court.
- § 114. Review of orders, judgments, or decrees.
- § 115. Limitation of criminal proceedings.
- § 116. Costs; attorney's fees.

§101. INFRINGEMENT.—If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—To an injunction restraining such infringement;

(b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyright-

ed photograph, such damages shall not exceed the sum of \$200 nor be less than the sum of \$50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of \$100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of \$5,000 nor be less than \$250, and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, \$50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance; in the case of other musical compositions \$10 for every infringing performance;

(c) IMPOUNDING DURING ACTION.—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) DESTRUCTION OF INFRINGING COPIES AND PLATES.—To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

(f) RULES OF PROCEDURE.—[*Repealed*]⁶

§102. JURISDICTION OF COURTS IN ENFORCING REMEDIES.—[*Repealed*]⁶

§103. JOINDER OF PROCEEDINGS FOR DIFFERENT REMEDIES.—[*Repealed*]⁶

§104. WILLFUL INFRINGEMENT FOR PROFIT.—Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringe-

⁶Sections 101 (f), 102 and 103 were repealed by the Act of June 25, 1948 (62 Stat. 869). However, see sections 1338 and 2072 of Title 28, United States Code, and the Federal Rules of Civil Procedure.

ment, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than \$100 nor more than \$1,000, or both, in the discretion of the court: *Provided, however,* That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

§105. FRAUDULENT NOTICE OF COPYRIGHT, OR REMOVAL OR ALTERATION OF NOTICE.—Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this title, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than \$100 and not more than \$1,000. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of \$100.

§106. IMPORTATION OF ARTICLE BEARING FALSE NOTICE OR PIRATICAL COPIES OF COPYRIGHTED WORK.—The importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or any piratical copies of any work copyrighted in the United States, is prohibited.

§107. IMPORTATION, DURING EXISTENCE OF COPYRIGHT, OF PIRATICAL COPIES, OR OF COPIES NOT PRODUCED IN ACCORDANCE WITH SECTION 16 OF THIS TITLE.—During the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section 16 of this title, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photoengraving process not performed within the limits of the United States, in accordance with the provi-

sions of section 16 of this title, is prohibited: *Provided, however,* That, except as regards piratical copies, such prohibition shall not apply:

(a) To works in raised characters for the use of the blind.

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization.

(c) To the authorized edition of a book in a foreign language or languages of which only a translation into English has been copyrighted in this country.

(d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

First. When imported, not more than one copy at one time, for individual use and not for sale; but such privilege of importation shall not extend to a foreign reprint of a book by an American author copyrighted in the United States.

Second. When imported by the authority or for the use of the United States.

Third. When imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, or for any college, academy, school, or seminary of learning, or for any State, school, college, university, or free public library in the United States.

Fourth. When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries designated in the foregoing paragraph, or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale: *Provided,* That copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this title, and such unlawful use shall be deemed an infringement of copyright.

§108. FORFEITURE AND DESTRUCTION OF ARTICLES PROHIBITED IMPORTATION.—Any and all articles prohibited importation by

this title which are brought into the United States from any foreign country (except in the mails) shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or the court, as the case may be, shall direct: *Provided, however,* That all copies of authorized editions of copyright books imported in the mails or otherwise in violation of the provisions of this title may be exported and returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury, in a written application, that such importation does not involve willful negligence or fraud.

§109. IMPORTATION OF PROHIBITED ARTICLES; REGULATIONS; PROOF OF DEPOSIT OF COPIES BY COMPLAINANTS.—The Secretary of the Treasury and the Postmaster General are hereby empowered and required to make and enforce individually or jointly such rules and regulations as shall prevent the importation into the United State of articles prohibited importation by this title, and may require, as conditions precedent to exclusion of any work in which copyright is claimed, the copyright proprietor or any person claiming actual or potential injury by reason of actual or contemplated importations of copies of such work to file with the Post Office Department or the Treasury Department a certificate of the Register of Copyrights that the provisions of section 13 of this title have been fully complied with, and to give notice of such compliance to postmasters or to customs officers at the ports of entry in the United States in such form and accompanied by such exhibits as may be deemed necessary for the practical and efficient administration and enforcement of the provisions of sections 106 and 107 of this title.

§110. JURISDICTION OF ACTIONS UNDER LAWS.—[*Repealed*]⁷

§111. DISTRICT IN WHICH ACTIONS MAY BE BROUGHT.—[*Repealed*]⁷

§112. INJUNCTIONS; SERVICE AND ENFORCEMENT.—Any such court or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course

⁷Sections 110 and 111 were repealed by the Act of June 25, 1948 (62 Stat. 869). However, see sections 1338 and 1400 of Title 28, United States Code.

and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

§113. TRANSMISSION OF CERTIFIED COPIES OF PAPERS FOR ENFORCEMENT OF INJUNCTION BY OTHER COURT.—The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office.

§114. REVIEW OF ORDERS, JUDGMENTS, OR DECREES.—The orders, judgments, or decrees of any court mentioned in section 110 of this title arising under the copyright laws of the United States may be reviewed on appeal in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively.

§115. LIMITATIONS OF CRIMINAL PROCEEDINGS.—No criminal proceeding shall be maintained under the provisions of this title unless the same is commenced within three years after the cause of action arose.

§116. COSTS; ATTORNEY'S FEES.—In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

Chapter 3 — Copyright Office

- §201. Copyright office; preservation of records.
- §202. Register, assistant register, and subordinates.
- §203. Same; deposit of moneys received; reports.
- §204. Same; bond.
- §205. Same; annual report.
- §206. Seal of copyright office.
- §207. Rules for registration of claims.
- §208. Record books in copyright office.
- §209. Certificates of registration; effect as evidence; receipt for copies deposited.
- §210. Catalogs of copyright entries; effect as evidence.
- §211. Same; distribution and sale; disposal of proceeds.
- §212. Records and works deposited in copyright office open to public inspection; taking copies of entries.
- §213. Disposition of articles deposited in office.
- §214. Destruction of articles deposited in office remaining undisposed of; removal of by author or proprietor; manuscripts of unpublished works.
- §215. Fees.

§201. COPYRIGHT OFFICE; PRESERVATION OF RECORDS.—All records and other things relating to copyrights required by law to be preserved shall be kept and preserved in the copyright office, Library of Congress, District of Columbia, and shall be under the control of the register of copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights.

§202. REGISTER, ASSISTANT REGISTER, AND SUBORDINATES.—There shall be appointed by the Librarian of Congress a Register of Copyrights, and one Assistant Register of Copyrights, who shall have authority during the absence of the Register of Copyrights to attach the copyright office seal to all papers issued from the said office and to sign such certificates and other papers as may be necessary. There shall also be appointed by the Librarian such subordinate assistants to the register as may from time to time be authorized by law.

§203. SAME; DEPOSIT OF MONEYS RECEIVED; REPORTS.—The Register of Copyrights shall make daily deposits in some bank in the District of Columbia, designated for this purpose by the Secretary of the Treasury as a national depository, of all moneys received to be applied as copyright fees, and shall make weekly deposits with the Secretary of the Treasury, in such manner as the latter shall direct, of all copyright fees actually applied under the provisions of this title,

and annual deposits of sums received which it has not been possible to apply as copyright fees or to return to the remitters, and shall also make monthly reports to the Secretary of the Treasury and to the Librarian of Congress of the applied copyright fees for each calendar month, together with a statement of all remittances received, trust funds on hand, moneys refunded, and unapplied balances.

§204. SAME; BOND.—The Register of Copyrights shall give bond to the United States in the sum of \$20,000, in form to be approved by the General Counsel for the Department of the Treasury and with sureties satisfactory to the Secretary of the Treasury, for faithful discharge of his duties.

§205. SAME; ANNUAL REPORT.—The Register of Copyrights shall make an annual report to the Librarian of Congress, to be printed in the annual report on the Library of Congress, of all copyright business for the previous fiscal year, including the number and kind of works which have been deposited in the copyright office during the fiscal year, under the provisions of this title.

§206. SEAL OF COPYRIGHT OFFICE.—The seal used in the copyright office on July 1, 1909, shall be the seal of the copyright office, and by it all papers issued from the copyright office requiring authentication shall be authenticated.

§207. RULES FOR REGISTRATION OF CLAIMS.⁸—Subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title.

§208. RECORD BOOKS IN COPYRIGHT OFFICE.—The Register of Copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this title, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this title he shall make entry thereof.

§209. CERTIFICATE OF REGISTRATION; EFFECT AS EVIDENCE; RECEIPT FOR COPIES DEPOSITED.—In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of

⁸Published in Title 37 of the Code of Federal Regulations and the Federal Register.

which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

§210. CATALOG OF COPYRIGHT ENTRIES; EFFECT AS EVIDENCE. —The Register of Copyrights shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalog of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalog for each class of copyright entries, and may thereupon, if expedient, destroy the original manuscript catalog cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalog of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration.

§211. SAME; DISTRIBUTION AND SALE; DISPOSAL OF PROCEEDS.⁹—The said printed current catalogs as they are issued shall be promptly distributed by the Superintendent of Documents to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised list of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster General, and they shall also be furnished in whole or in part to all parties desiring them at a price to be determined by the Register of Copyrights for each part of the catalog not exceeding \$25 for the complete yearly catalog of copyright entries. The consolidated catalogs and indexes shall also be supplied to all persons ordering them at such prices as may be fixed by the Register of Copyrights, and all subscriptions for the catalogs shall be received by the Superintendent of Documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time.

§212. RECORDS AND WORKS DEPOSITED IN COPYRIGHT OFFICE OPEN TO PUBLIC INSPECTION; TAKING COPIES OF ENTRIES.—The record books of the copyright office, together with the indexes to such record books, and all works deposited and retained in the copyright office, shall be open to public inspection; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the Register of Copyrights and approved by the Librarian of Congress.

§213. DISPOSITION OF ARTICLES DEPOSITED IN OFFICE.—Of the articles deposited in the copyright office under the provisions of the copyright laws of the United States, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

§214. DESTRUCTION OF ARTICLES DEPOSITED IN OFFICE REMAINING UNDISPOSED OF; REMOVAL OF BY AUTHOR OR PROPRIETOR;

⁹Section 211 as amended by the Act of April 27, 1948 (62 Stat. 202).

MANUSCRIPTS OF UNPUBLISHED WORKS.—Of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the Register of Copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: *Provided*, That there shall be printed in the Catalog of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided for in this title. No manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it.

§215. FEES.¹⁰—The Register of Copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees:

For the registration of a claim to copyright in any work, except a print or label used for articles of merchandise, \$4; for the registration of a claim to copyright in a print or label used for articles of merchandise, \$6; which fees shall include a certificate of registration under seal for each work registered: *Provided*, That only one registration fee shall be required in the case of several volumes of the same book published and deposited at the same time: *And provided further*, That with respect to works of foreign origin, in lieu of payment of the copyright fee of \$4 together with one copy of the work and application, the foreign author or proprietor may at any time within six months from the date of first publication abroad deposit in the Copyright Office an application for registration and two copies of the work which shall be accompanied by a catalog card in form and content satisfactory to the Register of Copyrights.

¹⁰Section 215 as amended by the Act of April 27, 1948 (62 Stat. 202) and the Act of June 3, 1949 (63 Stat. 153).

For recording the renewal of copyright and issuance of certificate therefor, \$2.

For every additional certificate of registration, \$1.

For certifying a copy of an application for registration of copyright, and for all other certifications, \$2.

For recording every assignment, agreement, power of attorney, or other paper not exceeding six pages, \$3; for each additional page or less, 50 cents; for each title over one in the paper recorded, 50 cents additional.

For recording a notice of use, \$2, for each notice of not more than five titles; and 50 cents for each additional title.

For any requested search of Copyright Office records, or works deposited, or services rendered in connection therewith, \$3 for each hour of time consumed.

SCHEDULE OF LAWS REPEALED BY ACT OF JULY 30, 1947

Section 2 of the Act of July 30, 1947 (61 Stat. 668) provides: "The following sections or parts thereof of the Revised Statutes and Statutes at Large covering provisions codified in this Act, insofar as such provisions appear in title 17, United States Code and supplements thereto, as shown by the appended table, are hereby repealed: *Provided*, That any rights or liabilities now existing under such repealed sections or parts thereof shall not be affected by such repeal:

Revised Statutes and Statutes at Large

	Title 17, United States Code, section
Act Mar. 4, 1909, ch. 320, secs. 1, 64, 35 Stat. 1075, 1088.....	1
Act Mar. 4, 1909, ch. 320, sec. 2, 35, Stat. 1076.....	2
Act Mar. 4, 1909, ch. 320, sec. 3, 35 Stat. 1076.....	3
Act Mar. 4, 1909, ch. 320, sec. 4, 35 Stat. 1076.....	4
Acts Mar. 4, 1909, ch. 320, sec. 5, 35 Stat. 1076; Aug. 24, 1912, ch. 356, 37 Stat. 488; July 31, 1939, ch. 396, sec. 2, 53 Stat. 1142.....	5
Act Mar. 4, 1909, ch. 320, sec. 6, 35 Stat. 1077.....	6
Act Mar. 4, 1909, ch. 320, secs. 7, 64, 35 Stat. 1077, 1088.....	7
Acts Mar. 4, 1909, ch. 320, sec. 8, 35 Stat. 1077; Dec. 18, 1919, ch. 11, 41 Stat. 369; Sept. 25, 1941, ch. 421, 55 Stat. 732.....	8
Act Mar. 4, 1909, ch. 320, sec. 9, 35 Stat. 1077.....	9
Act Mar. 4, 1909, ch. 320, sec. 10, 35 Stat. 1078.....	10
Acts Mar. 4, 1909, ch. 320, sec. 11, 35 Stat. 1078; Aug. 24, 1912, ch. 356, 37 Stat. 488.....	11
Acts Mar. 4, 1909, ch. 320, sec. 12, 35 Stat. 1078; Mar. 28, 1914, ch. 47, sec. 1, 38 Stat. 311.....	12

Act Mar. 4, 1909, ch. 320, sec. 13, 35 Stat. 1078.....	13
Act Mar. 4, 1909, ch. 320, sec. 14, 35 Stat. 1078.....	14
Acts Mar. 4, 1909, ch. 320, sec. 15, 35 Stat. 1078; July 3, 1926, ch. 743, 44 Stat. 818.....	15
Act Mar. 4, 1909, ch. 320, sec. 16, 35 Stat. 1079.....	16
Act Mar. 4, 1909, ch. 320, sec. 17, 35 Stat. 1079.....	17
Acts June 18, 1874, ch. 301, sec. 1, 18 Stat. 78; Mar. 4, 1909, ch. 320, secs. 18, 64, 35 Stat. 1079, 1088.....	18
Act Mar. 4, 1909, ch. 320, sec. 19, 35 Stat. 1079.....	19
Act Mar. 4, 1909, ch. 320, sec. 20, 35 Stat. 1080.....	20
Acts Mar. 4, 1909, ch. 320, sec. 21, 35 Stat. 1080; Dec. 18, 1919, ch. 11, 41 Stat. 369.....	21
Act Mar. 4, 1909, ch. 320, sec. 22, 35 Stat. 1080.....	22
Acts Mar. 4, 1909, ch. 320, sec. 23, 35 Stat. 1080; Mar. 15, 1940, ch. 57, 54 Stat. 51.....	23
R. S., sec. 4953; Act Mar. 4, 1909, ch. 320, secs. 24, 64, 35 Stat. 1080, 1088	24
Acts Mar. 4, 1909, ch. 320, sec. 25, 35 Stat. 1081; Aug. 24, 1912, ch. 356, 37 Stat. 489.....	25
Act Mar. 4, 1909, ch. 320, sec. 26, 35 Stat. 1082.....	26
Act Mar. 4, 1909, ch. 320, sec. 27, 35 Stat. 1082.....	27
Act Mar. 4, 1909, ch. 320, sec. 28, 35 Stat. 1082.....	28
Act Mar. 4, 1909, ch. 320, sec. 29, 35 Stat. 1082.....	29
Act Mar. 4, 1909, ch. 320, sec. 30, 35 Stat. 1082.....	30
Act Mar. 4, 1909, ch. 320, sec. 31, 35 Stat. 1082.....	31
Act Mar. 4, 1909, ch. 320, sec. 32, 35 Stat. 1083.....	32
Acts Mar. 4, 1909, ch. 320, sec. 33, 35 Stat. 1083; Apr. 11, 1940, ch. 81, 54 Stat. 106.....	33
Acts Mar. 4, 1909, ch. 320, sec. 34, 35 Stat. 1084; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921.....	34
Act Mar. 4, 1909, ch. 320, sec. 35, 35 Stat. 1084.....	35
Act Mar. 4, 1909, ch. 320, sec. 36, 35 Stat. 1084.....	36
Act Mar. 4, 1909, ch. 320, sec. 37, 35 Stat. 1084.....	37
Act Mar. 4, 1909, ch. 320, sec. 38, 35 Stat. 1084.....	38
Act Mar. 4, 1909, ch. 320, sec. 39, 35 Stat. 1084.....	39
Act Mar. 4, 1909, ch. 320, sec. 40, 35 Stat. 1084.....	40
Act Mar. 4, 1909, ch. 320, sec. 41, 35 Stat. 1084.....	41
Act Mar. 4, 1909, ch. 320, sec. 42, 35 Stat. 1084.....	42
Act Mar. 4, 1909, ch. 320, sec. 43, 35 Stat. 1084.....	43
Act Mar. 4, 1909, ch. 320, sec. 44, 35 Stat. 1084.....	44
Act Mar. 4, 1909, ch. 320, sec. 45, 35 Stat. 1085.....	45
Act Mar. 4, 1909, ch. 320, sec. 46, 35 Stat. 1085.....	46
Act Mar. 4, 1909, ch. 320, sec. 47, 35 Stat. 1085.....	47
Acts Mar. 4, 1909, ch. 320, sec. 48, 35 Stat. 1085; Mar. 4, 1923, ch. 265, sec. 1, 42 Stat. 1488.....	48
Act Mar. 4, 1909, ch. 320, sec. 49, 35 Stat. 1085.....	49

Act Mar. 4, 1909, ch. 320, sec. 50, 35 Stat. 1085.....	50
Act Mar. 4, 1909, ch. 320, sec. 51, 35 Stat. 1085.....	51
Act Mar. 4, 1909, ch. 320, sec. 52, 35 Stat. 1085.....	52
Act Mar. 4, 1909, ch. 320, sec. 53, 35 Stat. 1085.....	53
Act Mar. 4, 1909, ch. 320, sec. 54, 35 Stat. 1086.....	54
Acts Mar. 4, 1909, ch. 320, secs. 55, 64, 35 Stat. 1086, 1088; Mar. 2, 1913, ch. 97, 37 Stat. 724.....	55
Act Mar. 4, 1909, ch. 320, sec. 56, 35 Stat. 1086.....	56
Acts Mar. 4, 1909, ch. 320, sec. 57, 35 Stat. 1086; May 23, 1928, ch. 704, sec. 1, 45 Stat. 713.....	57
Act Mar. 4, 1909, ch. 320, sec. 58, 35 Stat. 1086.....	58
Act Mar. 4, 1909, ch. 320, sec. 59, 35 Stat. 1087.....	59
Act Mar. 4, 1909, ch. 320, sec. 60, 35 Stat. 1087.....	60
Acts Mar. 4, 1909, ch. 320, sec. 61, 35 Stat. 1087; May 23, 1928, ch. 704, sec. 1, 45 Stat. 714.....	61
Act Mar. 4, 1909, ch. 320, sec. 62, 35 Stat. 1087.....	62
Act July 31, 1939, ch. 396, sec. 3, 53 Stat. 1142.....	64
Act July 31, 1939, ch. 396, sec. 4, 53 Stat. 1142.....	65
Act June 27, 1938, ch. 10, sec. 1 (last proviso) 52 Stat. 6.....	
Title 39, U. S. C., sec. 371 (last proviso)"	

198. U. S. House Committee on Patents. 60th Congress, 2nd Session,

"The Constitution of the United States provides, Article I, section 8—

"Congress shall have the power . . . To promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

"It will be noted that the language of this authority limits the power of Congress by several conditions: The object of all legislation must be (1) to promote science and the useful arts; (2) by securing for limited times to authors the exclusive right to their writings; (3) that the subjects which are to be secured are the 'writings of authors.' It will be seen, therefore, that the spirit of any act which Congress is authorized to pass, must be one which will promote the progress of science and the useful arts, and unless it is designed to accomplish this result, it would be beyond the power of Congress.

"The enactment of copyright legislation by the Congress . . . is not based upon any natural right that the author has . . . but upon the ground that the welfare of the public will be served and the progress of science and useful arts will be promoted . . . Not primarily

for the benefit of the author, but primarily for the benefit of the public, such rights are given . . .

"Section 41 . . . Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control over the article which is the subject of copyright after said proprietor has made the first sale." Committee report (No. 2222) on bill enacting Copyright Act of 1909. Feb. 22, 1909.

199. Fourth Circuit Court of Appeals held, counter to 2 CCA, that copyright is divisible. The case has been appealed to the Supreme Court, where the decision was reversed in June, 1949. *Wodehouse v. Commissioner*. 4 CCA., 166 F2 986. 1948.

200. Association of Honorary Consultants to the Army Medical Library, Proceedings Third Annual Meeting, 1946.

201. Roeder, Martin A. Doctrine of Moral Right. 1940. (Harvard Law Review 53: 554-78.)

202. McCombs, C.F. The photostat in reference work. NYPL Bulletin 24: 535, 1920. "The New York Public Library installed a photostat in December, 1912."

203. Photographic copying in libraries. Library Journal 33: 223-4, 1908. Copying on plates was done at the Boston Public Library, with the Librarian's permission prior to June, 1908.

204. States that a licensee may sue under the Copyright Act. *Aeolian v. Royal Music Roll* 196 F. 926. 1912

205. The copyright on a book on bookkeeping cannot secure the forms illustrated—since they are intended for use. Only a patent can protect a system or invention.

Also included claim of unfair competition. *Aldrich v. Remington Rand*. 52 F.S. 732, COB 24: 23. 1942.

206. "The plaintiff is not entitled to be protected in his ideas, but he is entitled to be protected in his expression or illustration of his ideas." *Ansehl v. Puritan*. 61 F2 131 (CCA8) COB 20: 44. 1932.

207. "... independent reproduction of a copyrighted musical work is not infringement . . ." *Arnstein v. Marks*. 82 F2 275 (CCA 2) COB 21: 11. 1936.

208. Copyright does not prevent user of common source from presenting an idea in book or play, if it is not copied from copyrighted work. *Bachman v. Belasco*. 224 F. 817 (CCA 2) COB 18: 11, 1915.

209. Copying from an infringing copy was held not to be "copying" of the copyrighted work. *Barry v. Hughes*. 103 F2 427, COB 22: 22. 1939.

210. "The trial judge found that the beneficial interest in the copyright was retained by Mr. Ladner. Complainant has the right to sue in equity . . . Here . . . the complainant is not a mere licensee, but has the full equitable title, and Wooster, who has the legal title, is one of the infringers and occupies a position altogether hostile to the complainant. Its right in this situation to sue in equity in its own name is plain in principle and well established by authority." Cites authorities. *Bisel v. Ladner*. 1 F2 436 (CCA 3) COB 20: 90. 1924.

211. "There is no property right in mere ideas . . . Ideas not reduced to concrete form are not protected . . . Such a right can exist only in the arrangement and combination of the ideas, i.e., in the form, sequence, and manner in which the composition expresses the ideas, not the ideas themselves." *Bowen v. Yankee Network*. 46 F.S. 62, COB 24: 83. 1942.

212. Equitable owner cannot defeat the title of one who deals with the person in whom legal title is vested. *Brady v. Reliance*. 229 F. 137 (CCA 2) COB 18: 41. 1916.

213. "The owner of the equitable title is not a mere licensee, and he may sue in equity, particularly where the owner of the legal title is an infringer or one of the infringers, thus occupying a position hostile to the plaintiff." *Browne v. Fowler*. 290 F. 751 (CCA 2) COB 19: 31. 1923.

214. ". . . plagiarism, if it exists at all, must be found in the finished motion picture. The Taylor scenario has not been published. It has never left the files of the film company. And unless Taylor's borrowing, assuming that there was such, was carried over into the picture by the director, so as to convey to the person who, having read the book sees the motion picture, the idea of identity, we have

neither access nor copying." *Cain v. Universal*. 47 F.S. 1013, COB 24: 115. 1942.

215. Stage business has no literary quality and cannot be copyrighted. *Chappel v. Fields*. (CCA 2) 210 F. 864, COB 17: 34. 1914.

216. "Copyright infringement, however, can only be based upon appropriation of copyrightable subject matter. It is conceded that the idea, as distinguished from the expression of it, has utility . . . These things are not copyrightable . . ." *Clair v. Philadelphia Storage Battery*. 43 F.S. 286, COB 24: 141. 1941.

217. Motion for temporary injunction from use of the name "Ziegfeld" denied. "We believe it well-settled that the good-will or name of a business that is strictly personal in its nature and one which requires personal skill, such as the business of a doctor, dentist, attorney or playwright, cannot be conveyed after one's death by his representative." *Coffey v. M.G.M.* 160 N.Y. 186, COB 21: 3, 1936.

218. "A publisher may take out copyright, and, although legal title vests in him, it may, however, be held in trust for true owner and the question as to true ownership is one of fact dependent upon the circumstances of the case." *Cohan v. Richmond*. 19 F.S. 771, COB 21: 44, 1937.

219. "I am not satisfied that an author can copyright a play under one title, produce it under another, and hold as an infringer a person who has been misled by his action." *Collier v. Imp Films*. 214 F. 272, COB 17: 39. 1913.

220. "I have concluded that plaintiff does not come into this court of equity with clean hands and for that reason, among others, the bill of complaint should be dismissed on the merits." *Colonial Book v. Oxford Book*. 45 F.S. 551, (CCA 2) 57 U.S.P.Q. IV, COB 24: 169, 1942.

221. Suit for breach of contract under a copyright may be maintained in a state court even though a copyright suit may not. *Condon v. Assoc. Hospital Service*. 52 U.S.P.Q. 637, COB 24: 172, 1942.

222. The court held that use of an author's name in a version revised so extensively as to be a different story, so that it amounts to

discarding the story and application of the author's name and the title of the story to a wholly dissimilar tale is subject to injunction preventing such use. *Curwood v. Affiliated Distributors*. 283 F. 219, COB 19: 49. 1922.

223. "The plaintiff was not entitled to have his own name appear in the book." *De Bekker v. Stokes*. 153 N.Y.S. 1066, N.Y. Supreme Court Appellate Div., COB 18: 83, 1915.

224. "The plaintiffs . . . are guilty of unclean hands . . ." This "... requires dismissal of the Complaint." *Farrell v. Tostada*. COB 25: 134. 1944.

225. "... the purpose and effect of the copyright statute is to secure to the owner thereof of the exclusive right to multiply copies . . . The exclusive right to vend is limited." Rebinding of several copyrighted works together and reselling them was held not an infringement.

In the rehearing it was stated, "We are not convinced that the copyright of a book or periodical includes the cover. We can think of no convincing reason why it should, or should be intended to do so since . . . the cover ordinarily has no literary copyrightable matter and, when an individual design is embodied in it, its relation to the copyrighted literary content is remote and its authorship and ownership do not prima facie appear . . ."

The Court held, however, that a suit might be filed for unfair competition. *Fawcett v. Elliott*. 46 F.S. 717, rehearing 54 U.S.P.Q. 367, COB 24: 237, 238. 1942.

226. "The embodiment of the artist's concept and not the artist's concept is what is protected by copyright." *Fleischer v. Freundlich*. 5 F.S. 808, COB 20: 245. 1934.

227. Judge Bright, S.D.N.Y., said, "The certificate is prima facie evidence that plaintiff is the proprietor and has title to the copyright . . . The possession of the manuscript by the plaintiff is evidence of his ownership and is sufficient as against the defendants who have no rights in the premises." *Freudenthal v. Hebrew Publ. Co.* 44 F.S. 754, COB 24: 247. 1942.

228. Despite all the other rulings on separability of the physical object and the literary property it must be noted that the Second

Circuit Court of Appeals said in this case: "Possession of a chattel is prima facie evidence of title. Ownership of an unpublished composition presumptively includes all the rights which the common law recognized therein, among them being the privilege of publication and of securing a statutory copyright." *Gerlach v. Morris*. 23 F2 159 (CCA 2) COB 20: 273. 1927.

229. "... I conclude the defendant, though he had access perhaps to the plaintiff's story and made a synopsis thereof for his files, is not guilty of plagiarism; has taken nothing from the plaintiff's story . . ." *Gropper v. Warner*. 38 F.S. 329, COB 24: 256. 1941.

230. Unclean hands debar equitable relief. *Harms v. Francis*. 231 F. 645 (CCA 2) COB 18: 159. 1916.

231. Failure of contract to include the right to screen credit was held to divest plaintiff of "all rights generally known as the moral rights of authors, which rights include the right to credit as author of a work." *Harris v. Twentieth Century*. 47 U.S.P.Q. 11, COB 23: 165. 1940.

232. "... creative work necessary to sustain a copyright" is lacking when plaintiff merely rearranges a column of figures horizontally instead of vertically. The copyright was held to be invalid. *Hengst v. Early*. 59 F.S. 8, COB 25: 218. 1945.

233. Reviews decisions on right to privacy as such and states, "... it is the general rule . . . that a person has no such exclusive right to the use of his own name as to prevent the assumption of its use by another. But it is different when one's own name is used in such a way as to amount to unfair competition. In connection with questions of that kind, a man's name is said to be his own property." *Hinish v. Meier, Oregon Supreme Court*, 113 Pac2 438, COB 24: 282. 1941.

234. "The plaintiffs have not set forth the . . . circumstances under which the copyright was registered in the name of Edwin H. Morris & Co. . . . 'for the benefit of the plaintiffs herein' . . . Before serving the second amended complaint plaintiffs should consider making Edwin H. Morris & Co., Inc., as the owner of the legal title, a party to this action. Plaintiffs may make that corporation a party defendant or an involuntary plaintiff if the corporation refuses to join in the suit." *Hoffman v. Santly-Joy*. 51 F.S. 778, COB 24: 298, 1943.

- 235.** "It is well settled that a mere aggregating of old materials does not amount to ordinary skill sufficient to lend copyrightability" *Jackson v. Quicksip*. 27 F.S. 338, COB 22: 155. 1939.
- 236.** Held that copyright on cards intended for a lottery may not be protected *Kessler v. Schreiber*. 39 F.S. 655, COB 24: 312. 1941.
- 237.** Those who reproduce from infringing copy without notice are not parties to breach of common law right. Right of privacy does not cover a dog. *Lawrence v. Ylla*. N.Y. Supr. Ct. Special Term, COB 24: 259. 1945.
- 238.** "It was held that relief could not be had on the ground of the deceased's right of privacy, as that right necessarily dies with her . . ." *Munden v. Harris*. 134 S.W. 1076, COB 18: 340. 1911.
- 239.** "Mere ideas are not protected . . . Emotions, like mere ideas, are not subject to preemption . . ." *Nichols v. Universal*. 34 F2 145, COB 20: 523. 1929.
- 240.** Reversed by the Circuit Court which held that announcing the performer's name in connection with a broadcast of an uncopyrighted record is neither an invasion of privacy nor unfair competition. *R.C.A. v. Whiteman*. 114 F2 86 (CCA 2) COB 23: 239. 1940.
- 241.** Misrepresentation in a trade catalog constitutes unclean hands. *Stone v. Duggan*. 220 F. 837 (CCA5) COB 18: 439. 1915.
- 242.** "A copyright does not give its owner any property in the thing copyrighted. It simply gives him protection against anyone copying it. Nor does it prevent anyone from using the copyrighted matter, if it is not copied or published." *Taylor v. Commissioner*. 51 F2 915 (CCA3) COB 20: 723. 1931.
- 243.** Unfair competition denied. *Affil. Enterprises v. Rock-Ola*. COB 22: 12. 1937.
- 244.** Unfair competition in use of title. *Blish v. N.B.C.* COB 24: 71. 1942.
- 245.** Unfair competition. *Cole v. Allen*. COB 24: 142. 1942.

- 246.** The New York Supreme Court, Special Term, said that use of a series title of another may be unfair competition. *Collier v. Jones*. 120 N.Y.S. 991, COB 18: 78. 1910.
- 247.** Case tried by N. Y. Supreme Court on unfair competition, then in the Federal Court on copyright claims. Case in the state court was limited to unfair competition by virtue of use of titles. *Feist v. Song Parodies*. (CCA 2) COB 25: 135. 1944.
- 248.** Cheaper reproduction not unfair competition. *Hebrew Publ. v. Sharfstein*. COB 24: 279. 1942.
- 249** “. . . the use by the defendants of the proposed title is calculated not only to create confusion in the public mind, but also to injure the property and property rights of the plaintiffs.” *Hemingway v. Film Alliance*. 46 U.S.P.Q. 568 (N.Y. Supreme Ct. N.Y. County) COB 23: 165. 1940.
- 250.** Charge of unfair competition must be tried on its merits. *Hurn v. Oursler*. 289 U.S. 238, COB 20: 330. 1933.
- 251.** Unfair competition in use of titles. *I.N.S. v. Assoc. Producers*. 273 F. 585, COB 19: 146. 1921.
- 252.** Taking idea from a copyrighted card was held not to be unfair competition. *Jackson v. Quickslip*. 110 F2 731 (CCA 2) COB 23: 178. 1940.
- 253.** Claim of unfair competition in use of a title. *Jerome v. Twentieth Century*. 58 F.S. 13, COB 25: 219. 1944.
- 254.** Difference in appearance of catalogs precluded argument of unfair competition. *Kaeser v. Merchants' Assoc.* 64 F2 575 (CCA 6) COB 20: 350. 1933.
- 255.** Includes claim of unfair competition. *Kemp v. Hirsch*. 34 F2 291, COB 20: 353. 1929.
- 256.** Unfair competition in relation to a title. *Lone Ranger v. Cox*. 39 F.S. 487, COB 24: 369. 1941.
- 257.** Partially similar title held not to be unfair competition. *McGraw Hill v. Am. Aviation*. COB 23: 214. 1940.
- 258.** Unfair competition in use of title. *Martenet v. United Artists*. 56 F.S. 639, COB 25: 299. 1944.

259. Title does not rest on copyright yet may be defended against unfair competition. *National Pictures v. Foundation Film*. 266 F. 208, COB 19: 295. 1920.

260. Capitalizing on the World Fair's name was held by the N. Y. Supreme Court, Appellate Division, to be unfair competition. *N. Y. World's Fair v. World's Fair News*. COB 23: 220. 1939.

261. Imitation of covers is unfair competition, but if the defendant refrains from doing that he may republish works not protected by copyright. *Ogilvie v. Royal*. 88 At. 318, Penna Supr. Ct., COB 18: 352. 1913.

262. Unfair competition in use of title. *Ott v. Keith*. COB 24: 463. 1941.

263. Use of title held unfair competition. *Patten v. Superior*. 8 F.S. 196, COB 20: 570. 1934.

264. Unfair competition. *Pocket Books v. Avon*. COB 24: 471. 1942.

265. The court held that producing a picture on the same subject as a play was not unfair competition. *Sherwood v. Twentieth Century*. COB 23: 314. 1940.

266. Use of a title which competes was stated to be unfair competition, independently of copyright. *Underhill v. Schenck*. 193 N.Y.S. 745 (N.Y. Supr. Ct. Appellate Div.) COB 19: 407. 1922.

267. "The plaintiffs are not entitled to judgment on their claim of unfair competition. The evidence does not establish that the title of its song had come to signify the plaintiff's song in the public mind." *Von Tilzer v. Vogel*. 53 F.S. 191, COB 24: 625. 1943.

268. "The attempt here to prevent copying without complying with the provisions of the copyright law must fail." *White v. Dreyfoos*. 142 N.Y.S. 37, (N.Y. Supr. Ct. Appellate Div.), COB 18: 495. 1913.

269. Mr. Justice Holmes said, "The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or

less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which can hardly be conceived except as a product of statute, as the authorities now agree." *White-Smith v. Appollo*. 209 U.S. 19. 1908.

INDEX

A

Abandonment 28, 30, 84, 86, 88, 89.
 Abernethy v. Hutchinson 97, 173.
 Abstract books 84.
 Abstracting 10.
 Access 86, 87, 101.
 Access, right to 130-.
 Adams, A. 64.
 Addresses 45.
 Advertisers' Exchange v. Anderson 173.
 Advertisers' Exchange v. Laufe 173.
 Advertising Exchange v. Witten 173.
 Advertising is not fair use 19.
 Aeolian v. Royal Music Roll 259.
 Affil. Enterprises v. Rock-Ola 264.
 Agency 56, 73, 75, 148-.
 Aldrich v. Remington Rand 259.
 Alterations 101.
 American Code v. Bensinger 174.
 American Institute of Architects v. Fenichel 70, 174.
 American Press v. Daily 185.
 American Tobacco v. Werckmeister 175, 184.
 Anderson v. Baldwin 175.
 Andrews v. Guenther 176.
 Ansell v. Puritan 71, 259.

Army Medical Library, Honorary Consultants 22, 151, 259.
 Architectural plans, publication 89.
 Arnstein v. A.S.C.A.P. 176.
 Arnstein v. Marks 259.
 Arnstein v. Porter 176.
 Arranging 51.
 Assignment 44, 46, 57-, 118, 121, 124, 170.
 Associated Press v. I.N.S. 206.
 Atlantic Monthly 51, 207.
 Atlantic Monthly v. Post 177.
 Atlas v. Street & Smith 177.
 Author 54, 56, 77-, 168.
 —corporate 77-, 123.
 —or proprietor 164.
 —or publisher 120, 161.
 —purposes 114, 117.
 —reputation 116.
 Authority of sources 8.

B

Bachman v. Belasco 260.
 Baker v. Libbie 177.
 Baker v. Selden 178, 221.
 Bamforth v. Douglass 178, 209.
 Banks v. Manchester 174.
 Baron v. Feist 178.
 Barry v. Hughes 260.
 Bartlett v. Crittenden 97, 178.
 Basevi v. O'Toole 179.
 Becker v. Loew's 179.
 Beifeld v. Dodge 179.
 Bell v. Catalde 94, 179.
 Bell v. Whitehead 179, 205.
 Beneficial interest 11, 58, 123.

Bennett v. Boston Traveler
 179.
 Bentley v. Tibbals 53, 181.
 Berry v. Hoffman 181.
 Bessett v. Germain 181.
 Bindings 72.
 Bisel v. Ladner 123, 260.
 Blish v. N.B.C. 264.
 Bloom v. Hamlin 71.
 Bobbs-Merrill v. Straus 181.
 Boosey v. Empire 71.
 Borden v. General Motors 182.
 Boucicault v. Fox 90, 182, 194.
 Boucicault v. Hart 219.
 Bowen v. Yankee Network 260.
 Brady v. Reliance 123.
 Bramwell v. Halcomb 194, 205.
 Broadway Music v. F.R. Pub-
 lishing 182.
 Brown v. Select Theatres 182.
 Brown Instrument v. Warner
 182.
 Browne v. Fowler 123, 260.
 Brunner v. Stix 183.
 Bureau of National Literature
 v. Sells 183.
 Butterworth v. Robinson 183.

C

Cain v. Universal 261.
 Caird v. Sime 183.
 Caliga v. Inter Ocean 183.
 Callaghan v. Myers 176, 184.
 Cardinal Film v. Beck 184.
 Carns v. Keefe 184.
 Carr v. National Capitol Press
 70, 184.
 Cary v. Longman 183.
 Chamberlain v. Feldman 185.
 Chamberlin v. Uris 185.

Chappel v. Fields 261.
 Chappell v. Costa 185.
 Charts for machines 74.
 Chautauqua v. National 185,
 186.
 Chicago Record v. Tribune 71.
 Christianson v. West 186.
 Clair v. Philadelphia Storage
 Battery 261.
 Clapp, V.W. vi.
 Clean hands 46, 84.
 Clemens v. Belford Clark 217.
 Clemens v. Press Publ. 20, 187.
 Coffey v. M.G.M. 261.
 Cohan v. Richmond 123, 261.
 Cohn v. Etchison 83, 187.
 Cole v. Allen 264.
 Collier v. Imperial Films 261.
 Collier v. Jones 265.
 Colonial Book v. Oxford Book
 261.
 Commercial use 16.
 Common law literary property
 12, 26-.
 —different from copyright 30,
 93.
 —duration 26, 90, 91.
 —fair use not permitted 32.
 —in letters 16.
 —nature of 26-.
 —right to first publication 27.
 —termination of 27, 48, 83.
 Competition, unfair 49.
 Compilation 51, 103.
 Composite works 44, 51, 126,
 166, 168.
 Condon v. Assoc. Hospital Ser-
 vice 261.
 Constitution 230.

Copying 10, 14, 43, 67, 74, 84,
96-.

—articles from periodicals 45.

—definition 96.

—for private use 73, 76.

—requisite to infringement 99.

—service in libraries 147.

—substantial 46, 49.

Copyright 12, 29-.

—application for, abandons
common-law right 31.

—definition 30, 168.

—differences from common-law
right 30, 31.

—divisibility 46, 47.

—extent of 53.

—fair use 32.

—how obtained v, 15, 61-.

—legal basis 43-.

—limitations 29.

—multiple 46, 79-82.

—purpose 29, 32, 41, 130.

—relation to scholars v, 9.

—scope 126, 159-.

—statute 43-.

—statutory damages 49.

—statutory restrictions 29, 31-.

—transfer 47.

—what does it protect? 51.

—who may obtain? 48, 56-.

Copyright Act 230.

Corcoran v. Montgomery
Ward 98, 187.

Corporate author 77-, 114-,
123.

Credit, right to, 15, 21, 23,
116.

Crowe v. Aiken 194.

Crown Feature v. Levy 187.

Crume v. Pacific 188.

Curtis Publishing Co. 64, 188.

Curwood v. Affiliated Distrib-
utors 262.

D

Daly v. Walrath 189.

Dam v. Kirke La Shelle 190,
195.

Damages 49, 82.

Date With Death 64.

Davenport Quigley v. Century
190.

Davies v. Bowes 190.

Death of a Salesman 66.

DeBekker v. Stokes 262.

Dedication 24, 49, 84, 85, 114.

DeJonge v. Breuker 190.

De Minimis . . . 45-.

De Montijo v. Twentieth Cen-
tury 190.

Deward v. Bristol 190, 191.

Dicks v. Brooks 174.

Dissemination 37, 40.

Dissertations 109, 143-.

Divisibility 46, 47, 167.

Dixon v. Runkel 191.

Dodd-Mead 65.

Donaldsons v. Becket 200.

Donnelley v. Haber 103, 191,
221.

Drama, public performance 45,
85, 91.

Drone, Copyright 188.

Dun v. Lumbermen's Credit
191.

Du Puy v. Post 191.

Duration of rights 26, 90.

Dymow v. Bolton 192.

E

Eggers v. Sun Sales 192.
 Egner v. Schirmer 192.
 Eichel v. Marcin 193.
 Eliot v. Geare 193.
 Ellinger, W.B. vi.
 Equitable ownership 123-.
 Evans, L.H. vi.

F

F.&D. Music v. Twentieth
 Century 193.
 Facts not property 13, 72.
 Fair Use iv, 19, 32, 67-, 96,
 134, 169.
 Falk v. Donaldson 193, 203.
 Fargo v. Brechet 223.
 Farmer v. Elsner 194, 221.
 Farrel v. Tostada 262.
 Fawcett v. Elliott 262.
 Feist v. Song Parodies 265.
 Ferris v. Frohman 89, 194.
 Fishbein, M. 22.
 Fitch v. Young 174, 195.
 Fleischer v. Freundlich 262.
 Folsom v. Marsh 68, 196, 199.
 Ford, L. 64.
 Ford v. Blaney 195, 196.
 Forms 70.
 Fox Film v. Doyal 33, 36, 196.
 Freundlich v. Hebrew Publ.
 57, 262.

G

Gambart v. Ball 197, 203.
 Geary v. Norton 204.
 Gendell v. Orr 87, 197.
 General public 168.
 General publication 86, 93.
 Gentlemen's Agreement 150,
 229.

Gerlach v. Morris 57, 263.
 Gill, R.S. 23.
 Ginn v. Appollo 198.
 Glazer v. Hoffman 89, 198.
 Golden Rose 65.
 Golding v. R.K.O. 199
 Goldwyn, S. 117.
 Gottsberger v. Aldine 176.
 Government documents 10, 84.
 Gray v. Russell 71.
 Greene v. Bishop 199.
 Gropper v. Warner 263.

H

H.F.S. & Co. 65.
 Harms v. Francis 263.
 Harper v. Donohue 179.
 Harris v. Coca Cola 199.
 Harris v. Twentieth Century
 263.
 Harrison v. Maynard 198.
 Hebrew Publ. v. Sharfstein
 265.
 Hemingway v. Film Alliance
 265.
 Hengst v. Early 263.
 Heywood v. Jerico 199.
 Higgins v. Keuffel 200.
 Hill v. Whalen 71, 200.
 Hinish v. Meier 263.
 Hinkson, P. 65.
 Hodges v. Welch 183.
 Hoffman, C. 54.
 Hoffman v. LeTraunik 200.
 Hoffman v. Santly-Joy 123,
 263.
 Hogg v. Kirby 204.
 Hollywood Plays v. Columbia
 200.
 Holmes, Justice 12, 32.

Holmes, O.W. 51, 207.
Holmes v. Hurst 192, 201.
Holt v. Liggett 71, 201.
Howell v. Miller 201.
Hughes, Justice 33, 36.
Hurn v. Oursler 265.
Hutchins v. Shead 71.

I

Ideas not literary property 13,
50, 72.
Illustrations 127.
Infringement 44, 101-, 108,
168.
Intangible property 26.
Intent 27, 28, 49, 114.
International News v. Associ-
ated Press 32, 201.
International News v. Associ-
ated Producers 265.
Iolanthe 188.

J

Jackson v. Quicksip 264, 265.
Jarrold v. Houlston 183, 205.
Jefferys v. Boosey 213.
Jerome v. Twentieth Century
265.
Jewelers' Mercantile v. Jewel-
ers' Weekly 202.
Johns v. Paull-Pioneer 71.
Johnston v. Twentieth Century
202.
Joint Committee on Materials
for Research 150.

K

Kaeser v. Merchant's Assoc.
265.
Kane v. Penna. Broadcasting
203.
Kaplan v. Fox Film 203.

Karll v. Curtis 203.
Keene v. Kimball 213.
Kemp v. Hirsch 265.
Kessler v. Schreiber 264.
King Features v. Fleischer 203.
Kipling v. Fenna 209.
Knopf, A.A. 65.
Korzybski v. Underwood 203.
Krafft v. Cohen 204.
Kreymborg v. Durante 204.
Kurfiss v. Cowherd 89, 204,
209.

L

Ladd v. Oxnard 204.
Lawrence v. Dana 39, 70, 185,
205.
Lawrence v. Ylla 264.
Lectures 45, 87, 91.
Legal basis of copyright 43-.
Letters 16, 105-.
Lewis v. Chapman 199.
Lewis v. Fullarton 183, 205.
Libraries 88, 136, 141, 145,
147, 149.
Licenses 46, 56, 84, 118, 121,
127, 128.
Levi, E.H. vi.
Limited publication 30, 86-, 93,
94, 109.
Literary property
—common law 12-.
—definition 168.
—differentiated from physical
object 26, 162.
—form 12.
—independent of manuscript
26.
—intellectual unit 126, 127.
—nature of 12, 15, 26, 157.

—philosophical bases 15-.
—statutory 12.
Local Trademarks v. Price 205.
Lone Ranger v. Cox 265.
Lowenfels v. Nathan 71.
Lydenberg, H.M. vi.

M

McCombs, C.F. 259.
McDaniel v. Freedman 63,
205.
McDonald v. DuMaurier 205.
McGraw-Hill v. American
Aviation 265.
Macklin v. Richardson 194.
Macmillan v. King 98, 206.
Mail and Express v. Life Pub.
Co. 206.
Making a Photograph 64.
Manuscripts
—independent of literary prop-
erty 16, 26.
—in libraries 136, 138.
—private use 111-.
—use 16, 67.
Marks v. Vogel 206.
Martinet v. United Artists
265.
Marx v. U.S. 206.
Matthews v. Palmer Bee 206.
Mawman v. Tegg 183, 199.
Meccano v. Wagner 207.
Mechanical reproduction 44,
100.
Melinat, C.H. 143.
Melville, H. 65.
Microfilm 10, 147.
Midcontinental Map v. Kintzel
103, 207.
Mifflin v. Dutton 62, 207.

Mifflin v. White 51, 53, 208.
Mikado 189.
Milk Route 65.
Millar v. Taylor 219.
Miller, A. 66.
Mills v. Standard Music 208.
Mimeographing 65.
Minister's Wooing 62, 207.
Mittenthal v. Berlin 208.
Moral rights 15, 20, 116, 163,
217.
Morris v. Ashbee 201.
Morris v. Kelley 114.
Morton v. Raphael 22, 91, 209.
Munden v. Harris 264.
Music, public performance 45,
87.

N

National Association of Book
Publishers 150.
National Geographic v. Classi-
fied Geographic 53, 103, 145,
210.
National Pictures v. Founda-
tion Film 266.
Nature of literary property 12.
New Fiction v. Star 210.
New York Times v. Sun 210.
New York World Fair v.
World's Fair News 266.
News, copyrightability 19, 84.
Nichols v. Pitman 97, 211.
Nichols v. Universal 71, 264.
Norm v. Brown 211.
Notice of copyright 10, 11, 61-
94, 166.
—illegible 62.
—omission 62.
—purpose 61.

—required in every copy 62,
125.

—supplementary statements
63-.

Novels

—illustrations in, 126-127.

—public performance 45.

Novelty 13, 51, 55.

Nutt v. National 211.

O

Offering to public is publica-
tion 137-.

Official Aviation Guide v.

American Aviation 211.

Offset reproduction 103.

Ogilvie v. Royal 266.

Oliver v. St. Germain 57, 212.

Oliver, E.S. 65.

O'Neill v. General Film 212.

Originality 51, 54.

Ostenso, M. 65.

Ott v. Keith 266.

Out of print publications 131-.

Oxford Book v. College En-
trance Book 212.

P

Pages, replacement 146.

Paintings, exhibiting 91, 94.

Palmer v. De Witt 177, 194.

Parton v. Prang 213.

Patten v. Superior 266.

Pearson, D.H. 7, 224.

Penn Sportservice v. Goldstein
213.

Performing rights v. copy rights
90.

Periodicals articles 51, 53, 59,
114, 124.

Perris v. Hexamer 213.

Phonograph records 45.

Photo-Drama v. Social Uplift
Film 213.

Photographic copying 102, 139.

Photostat service 10, 147.

Piazza Tales 65.

Pike v. Nichols 71.

Pirated material 84, 101.

Play right 47.

Pocket Books v. Avon 266.

Poems, public performance 45.

Press Pub. v. Monroe 211, 213.

Printing 43, 88.

Privacy 15, 105, 106, 108, 111.

Private use 97, 98, 106, 109,
111, 131-, 148-, 167.

Produce Reporter v. Fruit Pro-
duce Rating 213.

Professor at the Breakfast
Table 51.

Profit, right to, 15, 18, 116,
117.

Proprietor 47, 56, 78, 118, 121,
152, 164, 166.

Protection, degree of, 55.

Public 168.

Public display 86.

Public domain 13, 44, 51, 62,
83-.

Public interest in copyright 32,
163, 165.

Public Ledger v. New York
Times 214.

Public Ledger v. Post 214.

Public presentation 86, 91.

Public records 84.

Public use 99, 106, 109, 134,
168.

Publication 27, 43, 86-, 108-.

- definition 168.
- by filing in public office 84.
- general 17, 86-.
- intent to publish 27, 28.
- limited 30, 86-.
- public display 27, 87, 136-.
- required to obtain copyright 61-, 92.
- restricted 30, 86-.
- Publisher
 - as author 123.
 - as proprietor 47, 152.
 - or author 115, 120, 161, 162.
 - trade practice v.
- Pulte v. Derby 214.
- Pushman v. New York Graphic 185, 214.

Q

- Queensberry v. Shebbeare 97, 215.
- Quinn-Brown v. Chilton 215.
- Quotation 65.

R

- R.C.A. v. Whiteman 264.
- Rebinding 72.
- Recompiling 53, 103, 145.
- Record & Guide v. Bromley 215.
- Recording 100.
- Rees v. Peltzer 208.
- Register of Copyright 44.
- Remick v. American Auto. 215.
- Remick v. General Electric 71.
- Renewal rights 118.
- Reprinting 24, 43, 91, 114, 125.
 - without notice 62.
- Reproduction 96, 99.
- Reputation 116-.

- Restricted publication 30, 38, 86-, 141.
- Reviewing 65.
- Reward to authors 42.
- Right
 - to access 130-.
 - to credit 15, 21, 23, 116, 164, 167.
 - to dedicate 24, 25, 112-.
 - to privacy 105-:
 - to recognition 24.
 - to reprint 24.
 - to restrict 37.
- Rights of users 19, 69, 72-, 116.
- to save mechanical labor 73, 75.
- Roberts v. Myers 182.
- Roeder, M.A. 259.
- Roworth v. Wilkes 199.
- Rush v. Oursler 71.

S

- Sale as publication 88.
- Sampson v. Murdock 205.
- Sampson v. Seaver 216.
- Sarony v. Burrows-Giles 218.
- Saunders v. Smith 183, 199, 205.
- Schellberg v. Emphringham 30, 91, 216.
- Schleman v. Guaranty Title 216.
- Scope of literary property 12.
- Scott v. Stanford 7.
- Scribner, C. 64.
- Seabury 20.
- Sermons, public presentation 45, 87.
- Shapiro-Bernstein v. Collier 216.

Sheldon v. Metro-Goldwyn 217.
 Shera, J.H. vi.
 Sherrill v. Grieves 217.
 Sherwood v. Twentieth Century 266.
 Shostakovich v. Twentieth Century 21, 218.
 Shubert v. Columbia 217.
 Sieff v. Continental 218.
 Sleight of hand tricks 54.
 Société des Films v. Vitagraph 218.
 Spiers v. Brown 205.
 Springer Litho. Co. v. Falk 206.
 Stage business 54.
 Stanley v. C.B.S. 218.
 Stecher v. Dunston 218.
 Stenographic labor not "copying" 97.
 Stephens v. Cady 185, 219.
 Stern v. Remick 176, 219.
 Stevens v. Gladding 220.
 Stodart v. Mutual Film 220.
 Stone v. Loew 220.
 Stone & McCarrick v. Duggan 53, 221, 264.
 Stories, public performance 45.
 Stowe, H.B. 62, 207.
 Strahan v. Graham 205.
 Straus v. American Publishers 221.
 Substantial copying 46, 49, 71, 102.
 Subcontractors Register v. McGovern 221.
 Superfine v. Denny 221.
 Sweet v. Benning 183.

Sweet v. Cater 205.
 Swift v. Collegian Press 221.

T

Taylor v. Commissioner 264.
 Theses 109, 128, 143-.
 Thomas v. Lennon 97, 222.
 Thompson v. Am. Law Book 180, 222.
 Thompson v. Hubbard 174.
 Thurber, J. 117.
 Tinsley v. Lacey 204, 205.
 Titles 50.
 Tompkins v. Halleck 194.
 Towle v. Ross 103, 222.
 Trade marks 50.
 Transfer of copyright 47.
 Tribune v. Associated Press 222.
 Turner v. Crowley 223.

U

Underhill v. Schenck 266.
 Unethical use 21, 23.
 Unfair competition 49, 73.
 United States Constitution 230.
 United States Copyright Act 230.
 United States. House Committee on Patents 32, 33, 258.
 United States v. Paramount 222.
 United Thrift Plan v. National Thrift Plan 222.
 Universal Film v. Copperman 211, 223.
 Universal Film v. Doyal 223.
 Use 14, 22, 23, 70, 84.
 —based on type of material 45, 70.

Users, rights of, 19, 69, 72-,
129-.

V

Van Veen v. Franklin 209, 223.

Vargas v. Esquire 22, 224.

Vend 29, 43, 72.

Vernon Abstract v. Waggoner
216.

Von Tilzer v. Vogel 266.

W

Waples, D. vi. .

Washingtonian v. Pearson 7,
224.

Webb v. Power 199.

Werckmeister v. American
Litho. 176, 205, 211, 218,
224.

West v. Thompson 73, 227.

Wheaton v. Peters 174, 179,
200, 228.

White v. Dreyfoos 266.

White-Smith v. Appollo 182,
267.

Wildman v. New York Times
228.

Wilkins v. Aiken 199.

Wire recordings 45.

Witmark v. Pastime 71.

Wodehouse v. Commissioner
259.

Woodman v. Lydiard 228.

"Work" 55.

Works for hire 123-.

Wright v. Eisle 228.

Writings 54, 77-, 168.

Y

Yuengling v. Schile 229.

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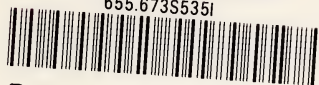
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